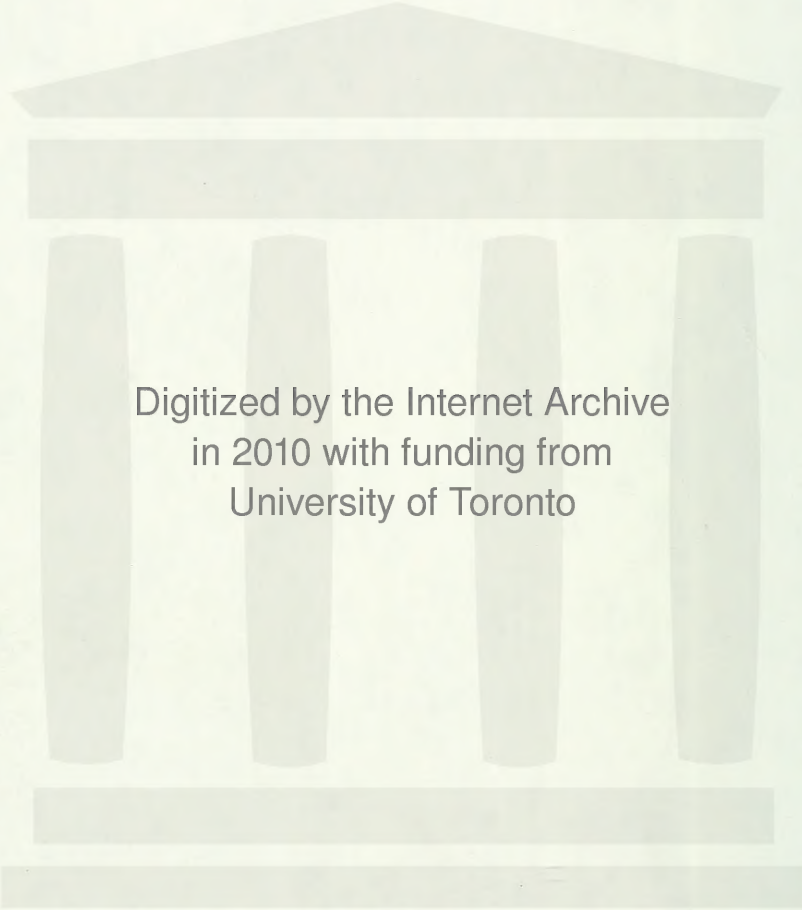




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PREFACE.

In publishing this volume the object of the author has been to give as succinctly as possible not a mere commentary on the Pre-emption Act, but a general survey of the whole law of pre-emption as applicable to the Punjab.

The Pre-emption Act does not touch on all points connected with the law of Pre-emption and an attempt has been made to make the survey as complete as possible.

The arrangement of the book and some of the matter is, the author thinks, new.

Experience has shown him that for reference the common practice of annotating an Act under each section may have some advantages, but these advantages are lost by the fact that that method gives the reader no knowledge of the principles underlying the law, and he considers that it is partly the neglect of the principles of the law of pre-emption that has led that subject to be regarded as so complicated and unintelligible.

The text has, therefore, attempted to enunciate on historical and juridical bases the principles of the law, tracing them through their various vicissitudes, and, as each principle is enunciated, to give the authorities supporting and against the view taken, attempting also, where possible, to find some common principle which will bring the apparently divergent views into harmony.

For the purpose of reference the Punjab Act has been printed at the commencement of the volume with foot-notes showing where in the text the sections themselves are dealt with, a very complete index has been annexed and, at the commencement of each chapter, a paradigm has been prefixed which will show at a glance the scheme of the chapter,

The new matter, a proper understanding of which seems to be essential in considering the law, is scattered throughout the volume, but more especially in the chapters on Origins and on the Nature of the Pre-emptive Right, and the author trusts that the views propounded in Chapter IV will help in elucidating and explaining some of the most difficult points in the law.

Much of the difficulty in the Pre-emption Law seems to have arisen from the want of precision in the terminology used, and in adopting the phrases "Statutory qualifications" instead of the old indefinite term "Incidents of the custom," and the phrase "Price Payable" as distinguishable both from the "Price Paid" and "Market Price," he trusts some ambiguities will be removed.

The size of the actual text has been reduced by relegating lists and notifications to the Appendices.

Reference has been made to all rulings published in the official reports up to the end of 1912, and some rulings subsequent thereto, printed in unofficial publications, are also noted.

The author trusts that any defect or omission noted will be pointed out to him for correction, and that the defects of the volume and the views taken will be not too severely criticized.

MULTAN,

March 17th, 1913. }

T. P. ELLIS.

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PART I.

THE PUNJAB PRE-EMPTION ACT OF 1913.

ACT No. 1 OF 1913.

An Act to amend the Law relating to Pre-emption in the Punjab.

(Received the assent of the Governor-General in Council on March 1st, 1913, and first published in the Punjab Government Gazette on March 14th, 1913).

WHEREAS it is expedient to amend the law relating to pre-emption in the Punjab ;

It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be-called the Punjab Pre-emption Act, 1913.

(2) It extends to the Punjab.

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2. (1) The Punjab Pre-emption Act, 1905, is hereby repealed.

(2) Nothing in this Act shall affect the provisions of Order 21, rule 88, of the Code of Civil Procedure, 1908, or sections 53 and 54 of the Punjab Tenancy Act, 1887.

(3) Notwithstanding anything to the contrary in section 4 of the Punjab General Clauses Act, 1898, the Courts shall in all suits, appeals and proceedings pending at the commencement of

this Act give effect, so far as may be, to the procedure prescribed by this Act.

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3. In this Act, unless a different intention appears from the subject or context,—

- (1) “agricultural land” shall mean land as defined in the Punjab Alienation of Land Act, 1900 (as amended by Act I of 1907), but shall not include the rights of a mortgagee, whether usufructuary or not, in such land ;
- (2) “village immoveable property” shall mean immoveable property within the limits of a village other than agricultural land ;
- (3) “urban immoveable property” shall mean immoveable property within the limits of a town, other than agricultural land. For the purposes of this Act a specified place shall be deemed to be a town (a) if so declared by the Local Government by notification in the official Gazette, or (b) if so found by the Courts ;

(4) “member of an agricultural tribe” and ‘group of agricultural tribes’ shall have the meanings assigned to them respectively under the Punjab Alienation of Land Act, 1900.

(5) sale shall not include—

(a) a sale in execution of a decree for money or an order of a Civil, Criminal or Revenue Court or of a Revenue Officer,

(b) the creation of an occupancy tenancy by a landlord, whether for consideration or otherwise ;

- (6) any expression which is defined by section 3 of the Punjab Land Revenue Act, 1887, shall, subject to the provisions of this Act, have the meaning assigned to it in the said section.

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CHAPTER II.

GENERAL PROVISIONS.

4. The right of pre-emption shall mean the right of a person to acquire agricultural land or village immoveable property or urban immoveable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales or of foreclosures of the right to redeem such property.

Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale.

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5. No right of pre-emption shall exist in respect of the sale of, or the foreclosure of, a right to redeem,—

(a) a shop, *serai* or *katra* ;

(b) a *dharmshala*, mosque or other similar building.

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6. A right of pre-emption shall exist in respect of agricultural land and village immoveable property, but every such right shall be subject to all the provisions and limitations in this Act contained.

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7. Subject to the provisions of section 5, a right of pre-emption shall exist in respect of urban immoveable property in any town or sub-division of a town when a custom of pre-emption

is proved to have been in existence in such town or sub-division at the time of the commencement of this Act, and not otherwise.

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8. (1) Except as may otherwise be declared in the case of any agricultural land in a notification by the Local Government, no right of pre-emption shall exist within any cantonment.

(2) The Local Government may declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sale or class of sales no right of pre-emption or only such limited right as the Local Government may specify shall exist.

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9. Notwithstanding anything in this Act, a right of pre-emption shall not exist in respect of any sale made by or to the Government or by or to any local authority or to any company under the provisions of Part VII of the Land Acquisition Act, 1894, or in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the Punjab Alienation of Land Act, 1900.

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10. In the case of a sale by joint-owners, no party to such sale shall be permitted to claim a right of pre-emption.

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11. No sum deposited in or paid into Court by a pre-emptor under the provisions of this Act or of the Code of Civil Procedure shall, while it is in the custody of the Court, be liable to attachment in execution of a decree, or order of a Civil, Criminal or Revenue Court or of a Revenue Officer.

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Decree or order defined	65
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CHAPTER III.

PERSONS IN WHOM THE RIGHT OF PRE-EMPTION VESTS.

12. In respect of all sales and foreclosures not completed before the commencement of this Act, the right of pre-emption shall be determined by the provisions of this Act; but in respect of all sales and foreclosures completed before the commencement of this Act, the right of pre-emption shall be determined by the law in force at the time of such completion.

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13. Whenever, according to the provisions of this Act, a right of pre-emption vests in any class or group of persons, the right may be exercised by all the members of such class or group jointly, and, if not exercised by them all jointly, by any two or more of them jointly, and, if not exercised by any two or more of them jointly, by them severally.

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14. No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.

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15. Subject to the provisions of section 14 the right of pre-emption in respect of agricultural land and village immovable property, shall vest—

(a) where the sale is by a sole owner or occupancy tenant or, in the case of land or property jointly owned or held, is by all the co-sharers jointly, in the persons in order of succession, who but for such sale would be entitled, on the death of the vendor or vendors, to inherit the land or property sold :

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

firstly, in the lineal descendants of the vendor in order of succession ;

secondly, in the co-sharers, if any, who are agnates, in order of succession ;

thirdly, in the persons, not included under *firstly* or *secondly* above, in order of succession, who but for such sale would be entitled, on the death of the vendor, to inherit the land or property sold ;

fourthly, in the co-sharers :

(c) if no person having a right of pre-emption under clause (a) or clause (b) seeks to exercise it,—

firstly, when the sale affects the superior or inferior proprietary right and the superior right is sold, in the inferior proprietors, and when the inferior right is sold, in the superior proprietors ;

secondly, in the owners of the *patti* or other sub-division of the estate within the limits of which such land or property is situate ;

thirdly, in the owners of the estate ;

fourthly, in the case of a sale of the proprietary right in such land or property, in the tenants (if any) having rights of occupancy in such land or property ;

fifthly, in any tenant having a right of occupancy in any agricultural land in the estate within the limits of which the land or property situated.

Explanation.—In the case of sale by a female of land or property to which she has succeeded on a life tenure through her husband, son, brother or father, the word ‘agnates’ in this section shall mean the agnates of the person through whom she has so succeeded.

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16. The right of pre-emption in respect of urban immoveable property shall vest,—

firstly, in the co-sharers in such property, if any ;

secondly, where the sale is of the site of the building or other structure, in the owners of such building or structure ;

thirdly, where the sale is of a property having a staircase common to other properties, in the owners of such properties ;

fourthly, where the sale is of property having a common entrance from the street with other properties, in the owners of such properties ;

fifthly, where the sale is of a servient property, in the owners of the dominant property, and *vice versâ* ;

sixthly, in the persons who own immoveable property contiguous to the property sold.

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17. Where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, the said right shall be exercised—

- (a) if they claim as co-sharers, in proportion among themselves to the shares they already hold in the land or property ;
- (b) if they claim as heirs, whether co-sharers or not, in proportion among themselves to the shares in which, but for such sale, they would inherit the land or property in the event of the vendor's decease without other heirs ;
- (c) if they claim as owners of the estate or recognised sub-division thereof, in proportion among themselves to the shares which they would take if the land or property were common land in the estate or the sub-division, as the case may be ;
- (d) if they claim as occupancy tenants, in proportion among themselves to the areas respectively held by them in occupancy right ;
- (e) in any other case, by such pre-emptors in equal shares.

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Sub-division of estate	101
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18. In the case of a foreclosure of the right to redeem village immoveable property, the provisions of sections 15 and 17, and in the case of a foreclosure of the right to redeem urban immoveable property, the provisions of sections 16 and 17 shall be construed by the Court with such alterations, not affecting the substance, as may be necessary or proper to adapt them to the matter before the Court.

Commentary :—*Nil.*

CHAPTER IV.

PROCEDURE.

19. When any person proposes to sell any agricultural land or village immoveable property or urban immoveable property, or to foreclose the right to redeem any village immoveable property or urban immoveable property, in respect of which any persons have a right of pre-emption, he may give notice to all such persons of the price at which he is willing to sell such land or property, or of the amount due in respect of the mortgage, as the case may be.

Such notice shall be given through any Court within the local limits of whose jurisdiction such land or property or any part thereof is situate, and shall be deemed sufficiently given

if it be stuck up on the *chaupal* or other public place of the village, town or place in which the land or property is situate.

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20. The right of pre-emption of any person shall be extinguished unless such person shall, within the period of three months from the date on which the notice under section 19 is duly given or within such further period, not exceeding one year from such date, as the Court may allow, present to the Court a notice for service on the vendor or mortgagee of his intention to enforce his right of pre-emption. Such notice shall state whether the pre-emptor accepts the price or amount due on the footing of the mortgage as correct or not, and if not what sum he is willing to pay.

When the Court is satisfied that the said notice has been duly served on the vendor or mortgagee, the proceedings shall be filed.

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21. Any person entitled to a right of pre-emption may, when the sale or foreclosure has been completed, bring a suit to enforce that right.

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Completion of sale	89
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22. (1) In every suit for pre-emption the Court shall at, or at any time before, the settlement of issues require the plaintiff to deposit in Court such sum as does not, in the opinion of the Court, exceed one-fifth of the probable value of the land or property, or require the plaintiff to give security to the satisfaction of the Court for the payment, if required, of a sum not exceeding such probable value within such time as the Court may fix in such order.

(2) In any appeal the Appellate Court may at any time exercise the powers conferred on a Court under sub-section (1).

(3) Every sum deposited or secured under sub-section (1) or (2) shall be available for the discharge of costs.

(4) If the plaintiff fails within the time fixed by the Court or within such further time as the Court may allow to make the deposit or furnish the security mentioned in sub-section (1) or (2), his plaint shall be rejected or his appeal dismissed as the case may be.

(4) (a) If any sum so deposited is withdrawn by the plaintiff, the suit or appeal shall be dismissed.

(b) If any security so furnished for any cause becomes void or insufficient, the Court shall order the plaintiff to furnish fresh security or to increase the security, as the case may be, within a time to be fixed by the Court, and if the plaintiff fails to comply with such order, the suit or appeal shall be dismissed.

(5) The estimate of the probable value made for the purpose of sub-section (1) shall not affect any decision subsequently come to as to what is the market value of the land or property.

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23. No decree shall be granted in a suit for pre-emption in respect of the sale of agricultural land until the plaintiff has satisfied the Court—

(a) that the sale, in respect of which pre-emption is claimed, is not in contravention of the Punjab Alienation of Land Act, 1900 ; and

(b) that he is not debarred by the provisions of section 14 of this Act from exercising the right of pre-emption.

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24. In a suit for pre-emption in respect of a sale of agricultural land, if the Court finds that the sale is in contravention of the Punjab Alienation of Land Act, 1900, the Court shall dismiss the suit.

Page.

Commentary :—

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25. (1 If, in the case of a sale the parties are not agreed as to the price at which the pre-emptor shall exercise his right of pre-emption, the Court shall determine whether the price at which the sale purports to have taken place has been fixed in good faith or paid, and if it finds that the price was not so fixed or paid, it shall fix as the price for the purposes of the suit the market value of the land or property.

(2) If the Court finds that the price was fixed in good faith or paid, it shall fix such price as the price for the purposes of the suit :

Provided that, when the price at which the sale purports to have taken place represents entirely or mainly a debt greatly

exceeding in amount the market value of the property, the Court shall fix the market value as the price of the land or property for the purposes of the suit, and may put the vendee to his option either to accept such value as the full equivalent of the consideration for the original sale or to have the said sale cancelled, and the vendor and vendee restored to their original position.

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26. If, in case of a foreclosure, the parties are not agreed as to the amount at which the pre-emptor shall exercise his right of pre-emption, the Court shall determine whether the amount claimed by the mortgagee is due under the terms of the mortgage, and whether it is claimed in good faith. If it finds that the amount is so due and is claimed in good faith, it shall fix such amount as the price for the purposes of the suit; but if it finds that the amount is not so due, or, though due, is not claimed in good faith, it shall fix, as the price for the purposes of the suit, the market value of the property.

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27. For the purpose of determining the market value, the Court may consider the following among other matters as evidence of such value :—

- (a) the price or value actually received or to be received by the vendor from the vendee or the amount really due on the footing of the mortgage, as the case may be ;
- (b) the amount of interest included in such price, value, or amount ;
- (c) the estimated amount of the average annual net assets of the land or property ;
- (d) the land revenue assessed upon the land or property ;
- (e) the value of similar land or property in the neighbourhood ;
- (f) the value of the land or property as shown by previous sales or mortgages.

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28. When more suits than one arising out of the same sale or foreclosure are pending, the plaintiff in each suit shall be joined as defendant in each of the other suits, and in deciding the suits the Court shall in each decree state the order in which each claimant is entitled to exercise his right.

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29. (1) The Court shall send to the Deputy Commissioner a copy of every original decree granting pre-emption other than a decree granting pre-emption in respect of a building or site of a building in a town or sub-division of a town, and the Deputy Commissioner may, within two months from the date of the receipt of such copy, apply to the Court to which the appeal in the pre-emption suit would lie, or, if no appeal lies, to the Divisional Court, for revision of the decree on the ground that the decision of the Court of first instance is contrary to the provisions of the Punjab Alienation of Land Act, 1900.

(2) No stamp shall be required upon such application, and the provisions of the Code of Civil Procedure as regards appeals shall apply, as far as may be, to the procedure of the Appellate Court on receipt of such application.

(3) No appearance by, or on behalf of, the Deputy Commissioner shall be deemed necessary for the disposal of the application.

Commentary :—

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CHAPTER V.

LIMITATION.

30. In any case not provided for by article 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in article 120 of the said schedule, be one year—

(1) in the case of a sale of agricultural land or of village immoveable property,

from the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained under the Punjab Land Revenue Act, 1887, or

from the date on which the vendee takes under the sale physical possession of any part of such land or property ;

whichever date shall be the earlier ;

- (2) in the case of a foreclosure of the right to redeem village immoveable property or urban immoveable property,

from the date on which the title of the mortgagee to the property becomes absolute ;

- (3) in the case of a sale of urban immoveable property, from the date on which the vendee takes under the sale physical possession of any part of the property.

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PART II.

CHAPTER I.

ORIGINS.

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3. Pre-emption administered in Allahabad as if derived exclusively therefrom.
4. Equities derived from Muhammadan Law.
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10. Regard paid to the Muhammadan Law in the Punjab.
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CHAPTER I.

ORIGINS.

1. The law of pre-emption in the Punjab deals with two distinct classes of immoveable property, *viz.*, rural and urban.

They have been dealt with in successive legislative enactments together, though different rules in certain particulars have been applied to the two classes, and they have been dealt with frequently in case law as if the rules relating to them had a common origin.

2. The Muhammadan Law possesses a developed system of pre-emption law, but this law primarily related to urban or house property and small plots of land, its basis being the desire to exclude from a particular locality strangers to that locality, the right of pre-emption being vested in the *shufa* or neighbour.

3. Largely under the influence of the legal ideas of the late Mr. Justice Mahmud, the Allahabad Court until lately has administered the law of pre-emption as if it owed its origin exclusively to that code of law. That Court, while recognizing and administering village Customary Law on the basis of village administration papers, which it has treated principally as agreements or contracts entered into by the village proprietors, has leaned to the view that the principles of the law of pre-emption were introduced into this country, both in respect to urban and rural property, by the Muhammadan conquerors, and that the non-Muhammadan populace, recognizing the benefits and utility of the system, adopted it with various modifications and applied it to properties not originally dealt with under the Muhammadan Code.

4. Consequently, when the Customary Law as recorded in the village administration papers was silent on any particular subject in connection therewith, the analogies of the Muhammadan Law were applied as being consistent with equity, justice and good conscience.

5. Authorities :—

(i) N. W. R. H. C. R. F. B. Rulings, 1866-7, p. 128.

Roberts, J. :—

The right of pre-emption among Hindus has been derived from the Muhammadan Law."

(ii) N. W. P. H. C. R., 1874, p. 28.

It is equitable in pre-emption suits to apply the Muhammadan Law relating thereto.

(iii) I All. 207.

The right of pre-emption known to the Muhammadan Law, and of which some of the expounders of that law declare the operation limited to houses and parcels of enclosed land, had in some instances become a village custom and attached to the alienation of shares in revenue-paying *mahals* when the first settlement under Regulation IX of 1833 was made in those provinces. These instances were, we believe, not numerous, but inasmuch as it was deemed conducive to the welfare and tranquillity of village communities that some such provision should be made to prevent the incursion into the community of strangers in race and religion, the officers engaged in the preparation of the records of right induced the proprietors to consent to the introduction of a stipulation binding each co-sharer when transferring his share to give the first refusal of it to one of his own family or to the other co-sharers in the *patti* or *mahal*."

(iv) V All. 110 and XII, All. 234

At least in Upper India the origin of the right of pre-emption is not traceable to any source other than Muhammadan Jurisprudence which the Mussulmans brought with them to this country. It may, therefore be safely laid down that in all cases in which the right of pre-emption is claimed, the Courts, in administering equity, will by analogy follow the rules of the Muhammadan Law of pre-emption even in cases where the right is not claimed under that law, but under local usage or custom.

(v) V All. 180.

There being no system of law prevalent in India, other than the Muhammadan Law, which provides systematic substantive rules in regard to the right of pre-emption, Courts of equity, acting upon the maxim "*aequitas sequitur legem*" will follow and adopt the analogies furnished by the rules of that law in dealing with cases of an equitable nature, in which the right of pre-emption is the subject of controversy.

(vi) V All. 199.

The right of pre-emption, though it has undergone some essential alterations, induced either by the force of custom or the express stipulations of co-parcenary bodies of landed proprietors is not traceable, at least in these provinces, to any other source than the influence of the Muhammadan Law.

In the absence of circumstances to the contrary the Court, in administering equity in cases of pre-emption, will follow the analogies furnished by the rules of the Muhammadan Law of pre-emption so long as those rules are consistent with the principles of justice, equity and good conscience.

(vii) VII All. 258.

The rule of pre-emption owes its origin in India to the influence of Muhammadan jurisprudence. Though originally a mere rule of law administered by the Courts, pre-emption has been adopted as a custom by village communities in various parts of India. They have in some respects altered the incidents of that right, but such alteration has almost invariably been in the direction of strengthening the right, removing its limitations, and extending it far beyond the original contemplation of the rules of Muhammadan Law.

(viii). VII All. 535.

Even though the right of pre-emption is not claimed under the Muhammadan Law but under a custom, the rules of Muhammadan Law must be applied by analogy.

(ix). VII All. 626.

Mahmud, J:—

The rule of pre-emption was originally introduced into India as a part of the Muhammadan Law, and must, by equitable analogy, be administered in the spirit of that law.

(x). VII All. 775.

Mahmud, J:—

The law of pre-emption is essentially a part of Muhammadan jurisprudence. It was introduced into India by Muhammadan judges who were bound to administer Muhammadan Law. Under their administration it became and remained for centuries the common law of the country and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan Law makes no distinction between persons of different races or creeds. In course of time pre-emption became adopted by Hindus as a custom. There never had been such a right as that of pre-emption recognised by Hindu Law. My idea is that the administration of law by Kazis during the Muhammadan period gave wide currency to *haqq-i-shufa* and its advantage became so apparent to the Hindus that they attempted to naturalize it.

(xi). IX All. 513 and XXVIII All. 60.

Where in a *Wajib-ul-arz* it was recorded merely that the custom of pre-emption prevails, it was held that in the absence of any special custom different from or not co-extensive with the Muhammadan Law of pre-emption, the Muhammadan Law must be followed.

(xii). XII All. 234.

There never has been any Hindu Law of pre-emption, and in no case in the printed records has any attempt been made to engraft on to the right of pre-emption the analogies of the Hindu Law relating to legal necessities.

Where pre-emption is claimed upon the pre-emptive clause of the *Wajib-ul-arz*, and in the absence of any specific provision in such clause upon any particular point, the Courts have followed the analogies of the Muhammadan Law of pre-emption and have laid down rules of law, which by dint of those analogies, have appeared to us consistent with justice, equity and good conscience. The right of pre-emption is unknown in those parts of India where Muhammadan jurisprudence had not in days gone by had full sway, and where Muhammadan influence was not felt as vigorously as in this part of the country.

(xiii). XXXI All. 519.

The rules of the Muhammadan Law relating to pre-emption, in the absence of good conscience must be taken into consideration.

6. This view of the origin of the Law of Pre-emption has also been taken in such published rulings as exist of the Calcutta and Bombay Courts:—

Authorities:—

(i). B. L. R., Sup. Vol 35.

The custom of pre-emption when it exists, must be presumed to be founded on, and co-extensive with the Muhammadan Law upon that subject, unless the contrary be shown, subject to modifications as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law.

(ii). B. L. R., F. B. Rulings 56.

As V All. 199.

(iii). VI Bom. H. C. R., 263.

There is no doubt that the custom in Guzarat is the Muhammadan right of pre-emption or *hagq-shufa*, and therefore that, in deciding such a suit as the present, it is to the particulars of that law we must look for guidance.

(iv). XXXIX Cal. 915. P. C.

The law of pre-emption was introduced into India with the Muhammadan Government.

7. This view of the origin of the law of pre-emption is not the one taken in the Punjab. Regarding the law of pre-emption primarily as a village institution, the Punjab Chief Court, while sometimes conceding the influence of Muhammadan law in the development of the law, traces its origin to archaic institutions.

Owing to the investigations of Sir Henry Maine and his followers, it is accepted that the original foundations of rural society was the tribe, or sub-division of a tribe, holding lands in common developing as the tribal cohesion loosened, into village communities. The land was originally the tribe's land and no particular member could postulate individual ownership. As society progressed the idea of individual ownership gradually grew, but the idea has never in the Punjab so far progressed as to allow the individual owner the right of free disposal.

From the earliest times the power to alienate land, which in theory belonged to the tribe or village, was limited by the power of the tribe or village to prohibit it absolutely, then to prohibit certain forms of alienation or to impose restrictions as to the purposes for which alienation might be effected, or when these purposes were satisfied to limit the choice of alienees to members of the tribe who would have the first right to take up the alienation, in other words had the right to pre-empt.

Authorities :

(i) Roe and Rattigan's Tribal Law.

Pre-emption is merely a corollary of the general principles regulating the succession to, and power of disposal of land.

(ii) P. R. 91 of 1875.

Boulnois, J. :—

The law of pre-emption, I understand to be traceable to three sources, and to three alone, *viz.*, (1) to village custom in India, (2) to the Muhammadan Law, (3) to the enacted law.

(iii) P. R. 103 of 1889.

The object of pre-emption in villages is to protect compactness of village communities.

(iv) 98 of 1394 F. B.

No member of the village proprietary groups is competent to sell his share to a stranger of his own free will and irrespective of the assent of the remainder of the co-sharers. The obligation is due by each to all the rest, and the right, viewed generally, is in all the rest against each.

The source of the obligation to which the right of pre-emption in a village corresponds is that the subject of sale is a thing viewed as conjointly held by a group of which the vendor is a member.

It is, in absence of an agreement to the contrary, a necessary consequence of this view, that a member of a group is incompetent to sell part of the thing conjointly owned, irrespective of their consent. The view commonly taken of the relation between a group of proprietors in a village community and the land of the village community is that the land is deemed to belong to the groups of proprietors, notwithstanding it has been in part distributed into parcels for separate enjoyment amongst the members of that group.

The incapacity of the holder of what is viewed as part of a larger and entire thing to make an effectual disposition of the part he holds, irrespective of the assent of other persons jointly interested in that whole, is now quite familiar to us. It arises from the relation between each individual member and the rest of the proprietary body as constituting together a single group, *qua* the land of the village.

So, all a plaintiff necessarily asserts is this, that by the custom of the village a co-sharer is not competent to sell or mortgage without the assent of the other co-sharers by reason of the relation existing between him and them as members of a local group.

For the purpose of the Customary Law the village community is essentially in its most simple form, a detached group of families, usually kindred families, united by local association. So long as the conception of the unity of the village community continues to retain its hold on the minds of the landholders, the land is not at the absolutely free disposal of the landholders. Where the power of free disposal of the land does not exist, there in all probability, if not necessarily, the land is to some extent subject to a custom of pre-emption, for the causes of a custom of pre-emption exist.

(v). P. R. 87 of 1895.

Roe, J.

The general principles governing the enjoyment of land held by village communities have now, generally speaking, been ascertained to be these. A proprietor or holder of a particular portion of this land has not an unrestricted power over it. He is entitled to the full enjoyment of it for his life-time, but his power of alienating it, except for necessity, is subject to the control of the other members of the village community. It is this principle of limited right, and not the Muhammadan Law, which is the foundation of the custom of pre-emption in villages.

(vi). P. R. 52 of 1896.

In this province pre-emption is merely a corollary of the general principles regulating the succession to, and the power of disposal of, land. It is the last means by which the natural heirs can retain ancestral property in the family when they are unable to altogether prevent an act of alienation by the holder of the estate.

(vii). P. R. 70 of 1905.

The theory of pre-emption of land is that all kinds of alienation are objectionable.

(viii). P. R. 74 of 1906.

Quotes P. R. 52 of 1896 with approval.

(ix). P. R. 90 of 1909.

Shahdin, J. :—

Pre-emption under the Muhammadan Law is, properly speaking, a town institution while customary pre-emption in the Punjab is in its inception a village institution, intimately connected with the origin and development of village communities.

In its nature and origin the right of pre-emption is nothing more or less than a right conferred upon, and exercisable by, each member of the proprietary body primarily with the object of preserving the integrity of the village community by preventing any interference with customary rules of inheritance.

8. The defect of the Allahabad view lies in its having ignored the existence of tribal or Customary Law in India, and in having assumed that all law in India, prior to the British occupation, was traceable to one of two sources, and one of two sources only, *viz.*, Hindu or Muhammadan Law. No doubt the original Muhammadan conquerors were imbued with, and followed Muhammadan principles of law, and no doubt also the higher Hindu castes followed their own law, but the same cannot be said of the indigenous converts to Islam or the lower castes of Hinduism.

How far this view is correct is apparent in the Punjab itself, where Muhammadan and Hindu Law play outside the cities an extremely small part in the lives of the people.

9. Though, as already pointed out, the views of the Punjab Chief Court and of the Allahabad Courts are opposed, it should be noted that in the latter Court opinions have been expressed in opposition to those promulgated by Mr. Justice Mahmud and generally accepted there. This is particularly the case in the most recent ruling of that Court.

Authorities:—

(i). N. W. R. H. C. R. F. B. Rulings 1866 67, p. 128.

It seems reasonable to conclude that it was with a view to prevent the intrusion of a stranger into the estate of the family or community, and to

exclude any person whose want of thought or skill might augment the burden of the other members of the co-parcenary community, rather than from any desire to borrow an institution from their Muhammadan neighbours, that Hindu communities caused stipulations for pre-emption to be inserted in the *Wajib-ul-arz*.

(ii). II All. 876.

Oldfield, J. :—

The right of pre-emption may be founded on the Muhammadan Law, or, as is more generally the case, where it affects Hindus, on long established custom having the force of law, or on special contract.

(iii). VII All. 626.

Petheram, C. J. :—

As I understand the matter, pre-emption has arisen out of a very old custom under which land was originally occupied by families or communities, and the rule originally was that if any individual went away or failed, his share became divisible among the rest; but afterwards there grew up a right based upon custom, by which the owner, before going away, might sell his share to his neighbours, and later still he became entitled to sell his share, not only to them but to a stranger, unless his co-sharers chose to buy him out.

(iv). XXXI All. 630.

Richards, J referring to VII All. 535 :—

"I cannot agree to the proposition that in pre-emption cases the rules of Muhammadan Law must be applied by analogy even where the right is claimed under Customary Law and not under Muhammadan Law. Sometimes no doubt a rule of the Muhammadan Law may be applied in a case arising out of custom, but this is because the rule is reasonable, just and equitable, apart from its being a rule of Muhammadan Law."

10. Although the Punjab view is that village Pre-emption Law owes its origin to archaic law, it must not be supposed that the Chief Court has ignored the influence that Muhammadan Law has exercised in towns.

Several rulings have insisted on the fact that the primary basis of pre-emption in towns is the Muhammadan idea of seclusion.

Authorities—

P. R. 91 of 1875, 133 of 1884, 108 of 1886, 42 of 1891, 17 of 1895, 49 of 1901.

The influence also of Muhammadan Law has also been referred to as one of the origins in P. R. 91 of 1875 *supra*, and by Shahdin, J. in P. R. 1909 in which attention is drawn to the fact that custom, statutory enactments and Muhammadan Law are the origins of the law of pre-emption in the Punjab.

Muhammadan influence has also been considered in determining whether a custom exists in a particular town or not.

If the town is Muhammadan in origin, it has been taken as sometimes affording a presumption that the custom exists there, if not of such origin, that it does not.

Authorities :—

P. R. 64 of 1887, 87 of 1890, 8 of 1893, 70 of 1899, 26 of 1900, 16 of 1902, 70 of 1902, 42 of 1905, 26 of 1907 and 32 of 1909.

11. It has sometimes been urged that one of the bases of the law of Pre-emption is Hindu Law, but the argument receives no support from published decisions, which are all opposed to this view.

Authorities :—

(i) VII All. 775, *supra*, p. 23.

(ii) XII All. 234, *supra*, p. 23.

(iii) S. D. A. Rep. (Calcutta) 17, 1820.

There is no right of pre-emption according to the Hindu law as current in Bengal,

(iv) II Select Reports All., p. 477.

Pre-emptive rights do not obtain as an universal custom among Hindus.

12. The tendency in the Panjab to view the whole law of Pre-emption from the point of view of rural pre-emption has been given expression to in legislative enactments. Custom has always been the basis of the right from the issue of the first enactment, the Panjab Civil Code of 1854. The same tendency was perpetuated in the Panjab Laws Act of 1872, and in its amendment of 1873.

Several other matters were in the absence of custom to be determined in accordance with the personal law of the persons litigating, but the law of Pre-emption was expressly excluded from this category.

Authorities :—

(i) 91 P. R. 1875, 192 of 1888, 8 of 1893, 67 of 1906.

(ii) P. R. 98 of 1898.

Mubammadan Law as to abatement of right by death is inapplicable to a claim to pre-empt agricultural land.

These views, which clearly follow from legislative enactment, have been carried to their logical conclusions in excluding all considerations of equity, justice and good conscience, when, the custom is established, in the following rulings :—

(i). P. R. 83 of 1888.

Considerations of equity and convenience, though they no doubt underlie the formation of a local custom in matters connected with pre-emption cannot, in my opinion, be substituted by the Court itself in the place of custom, that is to say as applying the rule of decision where no local custom is proved.

(ii). P. R. 109 of 1900.

The right of pre-emption being a right of a very special kind requires to be unequivocally proved. Considerations of equity, convenience, privacy, exclusion of strangers, and the like doubtless underlie the custom of pre-emption,

but the law requires that it should be proved in a concrete form, and it is not open to the Court to assume the existence of any particular incident in the absence of proof, merely because such incident can be supported on those considerations

13. These conflicting views of the Allahabad and Punjab Courts (which hold jurisdiction over the two provinces in India where pre-emption mainly exists) have led to results which, in my opinion, are opposed to a sound system of jurisprudence.

It will not be denied that a sound system of jurisprudence must be historically sound, and that clearly does not appear to be in the case in the matter of rural pre-emption as regarded by the Allahabad Court. At the same time, by referring the origins of pre-emption entirely to Muhammadan Law, a perfectly logical system of law has been built up. Taking Muhammadan Law as the basis of the right, and allowing modifications of that law to be applied when it is shown that custom or contract has modified it, it is on the principle that equity follows the law, correct to have resort to the Muhammadan Law as the basis of decision when custom or contract is silent on any particular point.

Consequently, the Allahabad Court has, by reference to Muhammadan principles of law, applied equitable rules and formulated principles of pre-emption applicable to various matters in cases of pre-emption based on custom or contract. It is entirely from the principles of Muhammadan law that the doctrines that pre-emption is a right of substitution, is a primary and secondary right, that the right is a personal right, that the right can be waived by conduct, and similar doctrines, with the numerous conclusions to be noted hereafter derived therefrom relating to title, encumbrances, intermediate profits, etc., have been built up by the Allahabad Court and applied to cases based on custom and contract.

On the other hand, while historically correct in treating the rural law of pre-emption as referable to archaic law, and while recognizing Muhammadan law as the probable basis of urban pre-emption, the Punjab Legislature and Courts, in expressly excluding from consideration the principles of Muhammadan Law, have left little to refer to for guidance in cases where equity has to be administered, or the general principle underlying the Law of Pre-emption has to be ascertained.

General principles and equity are not matters evolvable from a nebulous system or inner consciousness; they follow and are based on law, and as the only original system of law relating to pre-emption in India containing well-known and well defined rules of equity and principles of pre-emption was the Muhammadan Law, the main rules of equity and principle relating to pre-emption are derivable from that source alone.

No doubt Customary Law is law, and principles of equity may be derived therefrom. I am aware that in P. R. 98 of 1894 and in P. R. 10 of 1909 references have been made to Archaic Law or Customary Law to show that the doctrines that pre-emption is a primary and secondary right and a right of substitution are derivable therefrom, and that in P. R. 122 of 1907 Chatterji, J., in considering the question of compensation for improvements, relied on a rule of equity derivable from Indian contract law where a person is bound to make good advantages obtained when made in good faith, but these are isolated instances, and the fact remains that in administering equity, and in formulating principles, the Punjab Courts have had recourse to Muhammadan Law almost entirely, and have adopted in the main as applicable to the Punjab the same equities and the same principles which the Allahabad Court has derived from Muhammadan law.

We thus have the curious result that while, expressly debarred from resorting to Muhammadan Law, the Courts in the Punjab have been compelled to go to that law for its equitable rules and for guidance in determining what are the principles of the law of pre-emption.

It appears to me to be an unsatisfactory state of things, and it is of course arguable whether any of the principles so derived are applicable to the Punjab in view of the express prohibition referred to.

This difficulty has, I consider, been accentuated by codifying the customary law, for, with certain exceptions relating to urban property, custom has become stereotyped and the only resource open now is to custom as stereotyped in the Act itself and the Act has formulated no equitable principles, and has given only the most partial definition of what pre-emption is.

14. Though the Punjab system therefore appears to be illogical, Courts administering the Act can and should refer for equitable principles to case law, which is also law, notwithstanding the fact that that case law is largely based on principles to which by legislative enactment courts could not refer.

15. The origins of the law of pre-emption may therefore be stated to be these :—

- (a) as regards rural pre-emption, Archaic or Customary Law ;
- (b) as regards urban pre-emption, Muhammadan law modified by Customary Rules ;
- (c) as regards equities, case law based primarily on Mohammadan principles of equity

The Customary Law, both in regard to rural and urban pre-emption, has been dealt with in Statutory law in a series of enactments culminating in Act I of 1913, the consideration of which is dealt with in Chapter II.

CHAPTER II.

THE ACTS OF 1905 AND 1913.

PARA.

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CHAPTER II.

THE ACTS OF 1905 AND 1913.

1. The first legislative enactment, with reference to pre-emption in the Punjab, was the Punjab Civil Code of 1854, which, though strictly not a law, but a collection of rules for guidance of officers, was the basis on which Courts acted.

This was replaced by the Punjab Laws Act of 1872, which was subsequently amended in 1878.

2. The tenour of these Acts, whether dealing with urban or rural property, was to make "custom" the primary rule of decision.

3. In the Punjab Laws Act codification was attempted to a limited extent as regards rural property, when it was laid down that the custom was to be presumed to exist in villages, and exercisable by persons possessing certain qualifications, but this presumption and the priority of the qualifications were variable by proof of an opposite custom.

4. In regard to rural property, the object of these enactments was to maintain the integrity of the village unit, and this was sought to be done by presuming the existence of the right of pre-emption, and by giving preference to—

- (a) co-shares in the property ;
- (b) in *zamindari* villages, relations who were co-shares in the village ;
- (c) *pattidars*, jointly and severally ;
- (d) landowners in the estate ; and
- (e) occupancy tenants.

The result to some extent was, instead of strengthening the cohesion of the village, to weaken it, inasmuch as a co-sharer, *e.g.*, a money-lender, who had no real connection with the agricultural community, was in a better position than an actual blood relation or tribesman of the vendor, who held separate land in the village.

5. Moreover, owing to the gradual passing away of proprietary rights from agriculturists to non-agriculturists in satisfaction of debts,—a process much hastened by the famine of 1897, and by the enormous growth of population resulting in extreme sub-division of the land,—the political situation was considered by Government to be fraught with

danger, inasmuch as the rise of the "landless man," whose hereditary and sole calling was that of agriculture, resulted, in the later nineties, in serious dacoities in the central districts of the province.

This tension was partly allayed by the opening of the new canal colonies and by the check to population caused by the plague, but in Act XIII of 1900 restrictions of a wide-spreading nature were placed on the powers of alienation possessed by agriculturists, and on the powers of acquisition enjoyed by others.

The passing of this Act made certain provisions of the Punjab Laws Act relating to pre-emption in conflict with the new Act, *e.g.*, under the Punjab Laws Act a *bannia* co-sharer had a preference over an agriculturist non-cosharer, whereas under the Land Alienation Act the *bannia* could not acquire.

Accordingly, Act II of 1905 was designed primarily to bring the two enactments into conformity.

After an experience of some years' practise Act II of 1905 was found to cause considerable difficulties in interpreting, and it was considered also by certain sections of the community, that the Act pressed heavily upon particular interests. To remove certain ambiguities, and to provide a settlement of the alleged inequalities of the Act, the present Act of 1913 was enacted.

This Act is, to a large extent, a re draft of the Act of 1905, but some important changes have also been effected.

In addition to making the Law of Pre-emption coincide with the Law of Alienation, the Legislature in these two Acts undertook the settlement of other matters connected with pre-emption.

6. The results of the measures may be tabulated thus :—

(a). In respect to village property under the old law there was only a presumption that the custom of pre-emption existed.

When the custom itself was proved, or the presumption in its favour was unrebutted, the law declared that certain persons possessing certain statutory qualifications (or what have usually been termed the incidents of the custom) were entitled to exercise the right of pre-emption, but these statutory qualifications had to give way if the claimant was able to show that by custom certain other qualifications gave a preference over the statutory qualifications, and the order of priority, even of the statutory qualifications, was liable to be varied if it could be shown that custom sanctioned such variation.

Consequently, there were considerable differences in judicial decisions as to how far the initial presumption extended, as to what proof was

sufficient to rebut it and as to what qualifications other than the statutory ones were proved to exist.

Under the present law the custom is finally codified and given statutory sanction, that is to say, the right of pre-emption in respect to agricultural land and village immoveable property is no longer to be presumed and be liable to rebuttal, but is made a matter of positive law, and the statutory qualifications and the order of priority of those statutory qualifications, which a pre-emptor must possess, are laid down once for all, and they permit of no addition or variation by the proof of custom.

(b). In towns under the old law there was no presumption and the custom had to be proved to exist.

Further, no qualifications were stated, and it was open to anyone to come into court alleging that by custom any qualification he liked to assert gave him a right to pre-empt, and he was entitled to prove that allegation. Moreover, even where there were well-recognized qualifications, such as co-ownership and vicinity, the pre-emptor had to prove that his qualification was superior to that of the vendee.

The result was a most chaotic state of affairs, in some towns customary qualifications of a particular kind were held to confer the right, while in others not, in some towns one qualification was given preference over another, while in other towns the preference was reversed.

Not only that but the plaintiff had to show that the right of pre-emption attached to the particular property sold, and he was entitled to prove a custom in respect to any kind of immoveable property. Here, too, the results were chaotic, in some towns shops were liable to pre-emption, in others not, in some towns a share of a shop was liable, but not the whole shop, and so on through several variations.

Under the present law, though the codification has not proceeded to the same length as in villages, as it is still necessary to prove that the custom of pre-emption exists in a particular town or sub-division, there being no presumption one way or the other, there is a positive codification of the statutory qualifications which a would-be pre-emptor must possess, and of the order of priority thereof which cannot be varied by custom, and a negative codification in excluding from pre-emption certain groups or classes of immoveable property.

(c). Under the old law pre-emption could be shown by custom to exist with reference to all kinds of transfers, whether voluntary or compulsory, sales, mortgages, gifts, exchanges, leases, or what not. Under the present law it is strictly limited to voluntary transfers in the form of

sales of agricultural land, and sales and foreclosures of mortgages of village and urban immoveable property.

(d). Under Act II of 1905, the right to pre-empt agricultural land was practically limited to agriculturists, the one exception being contained in the proviso to section 11. Considerable change has now been effected by section 14, for which see paragraph 11, *k*, p. 42.

(e). Under the old law property was classified according to situation, *i. e.*, immoveable property situated in villages and immoveable property situated in towns.

Under the present law the classification is into three :—

- (i) agricultural land, wherever situated ;
- (ii) other immoveable property situated in villages ;
- (iii) other immoveable property situated in towns.

In respect to agricultural land, no matter where situated, subject to the exception now made in sections 5 and 8, (section 7, Act II of 1905) the right of pre-emption is declared to exist in section 6 (section 5, Act II of 1905) and it is exercisable under the provisions of sections 14 and 15 (sections 11 and 12, Act II of 1905); in respect to other immoveable property situate in village sites the right is declared to exist in section 6 and to be exercised in accordance with the provisions of section 15 alone, while, with reference to urban immoveable property, it must be proved under section 7 (section 6, Act II of 1905), and when proved it is exercisable in accordance with the provisions of section 16 (section 13, Act II of 1905).

The principle that it is immaterial where the agricultural land is, has been clearly enunciated in—

(i). C. A. 738 of 1908.

Plaintiffs, members of an agricultural tribe and owners of land in Mozang (Lahore), held, entitled to exercise the right of pre-emption over agricultural land, irrespective of the fact that that land was purchased for building purposes and in the Municipal limits of Lahore.

And also in—

(ii). P. R. 26 of 1912.

Under the terms of section 3 (1) and (3) of the Pre-emption Act land which, at the time of the sale, was occupied or let for agricultural purposes or for purposes subservient to agriculture and was not occupied (as) the site of any building in a town or village, is subject to pre-emption under section 5, no matter whether it is situated in a town or village.

This provision renders obsolete the law laid down in P. R. 27 of 1907 and 51 of 1907, both cases under the Punjab Laws Act, which ruled that agricultural land situated in towns were pre-emptible only under section 11 of that Act.

(f). Certain kinds of sale and certain property are excluded from the operation of the right of pre-emption—sections 3 (5) and

(g). Subject to exceptions, cantonments are excluded from the operation of pre-emption, and the Local Government is given power to exclude other areas, or property or classes of property (section 8).

(h). Definite rules of law are laid down as to division among rival pre-emptors, the old doctrine of division *per capita* being practically abolished as regards rural property in Act II of 1905, though revived again in Act of 1913 to a certain extent, and the old rule of superior diligence as regards urban property having its scope considerably curtailed in Act II of 1905 and entirely done away with in the Act of 1913.

(i). The law regarding notice is made optional instead of compulsory.

(j). The rules as to preliminary deposit are made compulsory instead of optional, and these deposits are protected from attachment.

(k). To protect the observance of Act XIII of 1900 provisions relating to procedure are laid down.

(l). The law as to price payable is more clearly defined and indications are given as to what matters are to be considered in determining market price.

(m). The law of limitation is altered.

7. The following characteristics of the Acts should also be noted :—

(a). Neither Act contains the whole law of pre-emption.

Few provisions as to procedure or the doctrine of waiver are given, nothing is said as to the nature of the pre-emptive right and the consequences which flow therefrom, except that the right is a preferential one. The questions of compensation for improvements made by a vendee, the title acquired by the vendee, the transferability of the right, encumbrances created by the vendee, the person entitled to intermediate profits and kindred subjects are left untouched.

They are silent too on such matters as valuation, court-fees, estoppel of defence, costs, relevancy of evidence and numerable other matters.

The section of definitions is very scanty and the language of the Acts is in places ambiguous.

(b.) The Act of 1905 came into force on the 11th May 1905, the date on which the assent of the Governor-General in Council was

first notified by the Lieutenant-Governor of the Punjab, and the Act of 1913 on 14th March 1913.

(c). The Act of 1905 was retrospective in character, and its retrospective nature applied to cases regarding which a suit was brought after the passing of the Act, whether the right to sue had accrued before the passing of the Act or not.

Authorities—

P. R. 30 of 1907, 83 of 1907, 22 of 1908, 74 of 1909.

But it did not apply to—

α —Suits filed before the Act came into force. In such cases the law to be applied was that contained in the Punjab Laws Act.

β —Cases where the person entitled to pre-empt before the Act came into force, whether his right to pre-empt had been abolished by this Act or made inferior to that of the vendee or other claimant, had, in pursuance of that right, before the passing of the Act, made any payment or tender under sections 14, 15, Punjab Laws Act, or deposit after notice issued by the Court at the instance of the vendor under section 14, Punjab Laws Act.

γ —Where the person entitled to pre-empt before the Act came into force under the Punjab Laws Act, whether his right had ceased under the Act or made inferior to that of the vendee or claimant, had effectually asserted his pre-emptive right outside Court.

Authorities—

P. R. 17 of 1908, F. B., 22 of 1908, 90 of 1908.

(d). The retrospective nature of Act II of 1905 was one of the matters which appeared to be difficult to interpret, and in the new Act of 1913 all ambiguities and limitations as regards procedure are removed.

Section (3) of the Act of 1905, which dealt comprehensively with rights and procedure has disappeared, and section 2 (3) of the present Act provides that the procedure laid down in the new Act shall apply to all cases pending at the time the Act came into force.

Instead, however, of simplifying the provisions of section 2 (3) of Act II of 1905 with respect to the retrospective effect of the Act on rights which had already accrued, the present Act appears to make the position much more difficult,

So far as claims based on sales or foreclosures subsequent to the commencement of the present Act are concerned, the Act provides that the rights shall be determined by the provisions of the new Act, though the section does not elucidate the question as to when a sale or a foreclosure is completed, and it also appears to violate the fundamental provision of Pre-emption Law that the right to pre-empt is an inchoate right existing before it is infringed or, as it is generally called, a primary and a secondary right.

The greatest difficulty, however, must arise in regard to the second part of section 12, which provides that in respect to all sales and foreclosures completed before the Act, the right of pre-emption shall be determined by the law in force at the time the transaction was completed.

The result of this provision is that we have concurrent Acts dealing with rights which had accrued before or after the present Act came into force, as the case may be, so that, except as regards procedure claims arising out of transactions before the present Act, must be dealt with either under the Punjab Laws Act or Act II of 1905, whichever was in force at the time of the completion of the sale, and claims based on later transactions must be dealt with under the present Act.

Courts will probably find themselves in considerable difficulty in determining which Act is applicable to a particular case, they will find it extremely difficult to determine where the boundaries of "right" and "procedure" are to be fixed, and parties, according as it may suit their particular purpose, will be at issue as to when the transaction was completed.

It will suffice here to note one difficulty, *viz.*, the rules of distribution. Are the rules of distribution between rival pre-emptors rules of "right" or of "procedure"? The framing of the Act, which excludes section 17 from the Chapter on Procedure and speaks of the persons entitled to exercise the right, would appear to show that they are rules of right, though, properly speaking, section 17 would have found its most appropriate place in a Chapter on Procedure directing in a manner analogous to section 18 the method the Court should adopt in giving a decree where rival pre-emptors are found to be equally entitled. The difficulty will arise in the application of the last clause of section 17 which abolishes for the purposes of this Act the doctrine of election and the rules of superior diligence, rules which the Act leaves it in doubt whether they are applicable to pre-existing rights or not.

Section 12 was no doubt intended to meet quite different matters and should have been framed so as to provide that where a right to pre-empt had accrued before the Act came into force the persons who could exercise it were to be the persons possessed of the statutory qualifications necessary before the present Act came into force, and where it accrues after the present Act came into force it should be exercised by persons with the statutory qualifications laid down in the new Act, that is to say, the effect of section 12 should have been limited to qualifying rights at most.

This doubt raised at the very beginning of the Act makes it incumbent to consider in this book the parts dealing with rights under the old law of 1905.

(e). The Act is applicable to all classes of the community irrespective of race and religion, in this following the Punjab Laws Act.

23 of 1875.

The Punjab Laws Act, section 9, *et seq.*, apply where the vendor is a Christian. The Act does not exempt any class of persons of any particular religion from its operation.

(f). The Act extends to the Punjab, section 1 (2), and the provisions of Act II of 1905 with slight modifications were made applicable to the North-West Frontier Province by Regulation II of 1906. (See Appendix VIII and till the present Act is adopted Act II of 1905 will continue in force there.)

(g). Under section 2 (1), Act II of 1905, the enactments specified in the Schedule are repealed to the extent mentioned in the third column thereof and in section 2 (1) of the present Act, Act II of 1905 is repealed.

(h). In addition to the pre-emption rules laid down in the Act, under section 2 (2) the provisions of order XXI, rule 88, Code of Civil Procedure, and sections 53, 54, Tenancy Act remain unaffected.

(i). The Act of 1905 also created a right of pre-emption in favour of persons who had no right under the old law, so that a person who had no right under the old law to pre-empt a sale made before the Act came into force, but had a right under the Act II of 1905, could within limitation sue to pre-empt such sale in virtue of the right created in his favour by that Act.

That right, however, did not extend to the case where the sale had been made to a person who, before that Act came into force, had a superior right to pre-empt to the present plaintiff.

This rule was a violation of the fundamental basis of pre-emption that the pre-emptor to be entitled to pre-empt must have possessed his statutory qualifications at the time of the sale.

In the Act of 1913, by virtue of section 12, this violation of the fundamental basis of the Law of Pre-emption has been abolished so far as new transactions are concerned, and no new rights are created by the Act in respect to old transactions in favour of any one who had not those rights before, nor are any rights already existing in respect to completed transactions taken away.

(j). Under the old law it was not impossible for a new custom to grow up in the future, or for a right to be created by contract.

Under the Act of 1905 no custom could grow up after the passing of the Act; it must have been in existence at the time the Act came into force, and no right of pre-emption based on contract is apparently recognizable either under that Act or the present Act.

Section 6 of Act II of 1905 is reproduced in the Act of 1913 verbatim, and we now have the incongruity that a fresh lease of life for the growth of a custom has been granted in regard to sales completed after the present Act came into force. Here we have a further difficulty created by section 12, for, whereas if the sale was completed one day before the Act of 1913 came into force, the would-be pre-emptor cannot rely on a custom which had grown up after the Act of 1905 came into operation; whereas, if the sale be completed one day after the Act of 1913 came into force, he can prove a custom existing a day earlier.

This provision violates another fundamental rule of law (as, indeed, do all attempts at legislating on custom), *viz.*, that a custom to be a valid custom must be certain, invariable, and one so ancient that the memory of man runneth not to the contrary.

8. In addition to the changes wrought by the Acts of 1905 and 1913 in the pre-existing law already noted in paras. 6 and 7, the following further changes have been effected by the new Act in the law under Act II of 1905.

(a). In section 3 (1) statutory provision is made excluding from agricultural land mortgagee's rights therein, which were not subject to pre-emption though included in the definition of "agricultural land."

(b). In the same section the provision that agricultural land includes a right of occupancy has been removed as superfluous. A right of occupancy is still "agricultural land" and a sale thereof is subject to pre-emption, as it always has been.

In regard to occupancy holdings, section 5 (6) gives statutory effect to the rule that the creation as distinct from the sale of an occupancy tenure is not subject to pre-emption. The provision was probably superfluous, but all doubt is, however, now removed.

(c). In section 3 (2) the words "a village" are substituted for "village sites," a phrase which gave some difficulty in interpreting (see Definitions.—Village Sites), as it was a phrase hitherto unknown and undefined.

(d). In section 3 (4) an additional definition of "group of agricultural tribes" is given, being rendered necessary by the provisions of section 14.

(e). In section 3 (5) the operation of the section is limited so far as decrees of Civil Courts are concerned to decrees for money.

(f). Clause 2 of section 13 of Act II of 1905 has been expunged and the clause made a substantive section in section 5 with the effect of making the property therein mentioned not liable to pre-emption, whether situate in a town or elsewhere.

(g). In section 8 (2) the Local Government is given extended powers of exemption. Under the Act of 1905 the Local Government could merely exempt specified areas from the operation of the Act. It can now exempt not only areas but any land or property or class of land or property, or can limit the right of pre-emption thereto as it may specify. The object of this amendment was, while protecting agricultural land, to remove all disabilities from *bona fide* acquisitions of land for commercial developments in such areas as required land for that purpose, and incidentally also to permit the Local Government, on proper representation, to allow purchases of land for religious or similar buildings.

(h). In section 9 sales of property sanctioned by the Deputy Commissioner under the Punjab Alienation Act are exempted from pre-emption. The object of this provision is similar to that stated under (g) *supra*.

(i). Section 12, an entirely new section, has been dealt with under para. 7 (d) *supra* (p. 38).

(j). Section 13 is a new section removing certain verbal ambiguities existing in sections 12 and 13 of Act II of 1905. The exact meaning of jointly and severally is now settled.

(k). Section 14, which takes the place of section 11, Act II of 1905, effects the greatest change in the law.

Under the old Act any agriculturist could pre-empt a sale by an agriculturist, if he possessed the necessary statutory qualification. Now the right is limited to an agriculturist who is of the same group of agricultural tribes as the vendor.

This alteration has been rendered necessary by the notification under the Land Alienation Act of some quasi-agriculturists as agricultural tribes, who have not been included in the general district group.

The second alteration is of wider extent. Any agriculturist can still pre-empt, if he has the necessary qualifications, a sale made by a non-agriculturist, but, whereas, under Act II of 1905, a sale by a non-agriculturist could only be pre-empted by another non-agriculturist if he was of the same tribe as the vendor, and had been recorded for 20 years previous to the sale as an owner or occupancy tenant in the same estate either in his own name or that of an agnate, now under the present Act these limitations are removed, and where a sale is by a non-agriculturist another non-agriculturist can pre-empt agricultural land or village immoveable property if he has any of the statutory qualifications under section 15. A much wider scope is therefore given to non-agriculturists than they hitherto possessed.

(l). Section 15 reproduces section 12 of the old Act, the drafting being an improvement.

There are only three substantive alterations in this section. The first is in clause (b), firstly, where the words "in the male line" are excluded, so permitting a female with a right of succession to pre-empt, if otherwise entitled, and the second in the explanation. In the explanation under the old Act the agnates of a female selling property to which she had succeeded from her husband, son, father or brother were the agnates of the person she succeeded to, no matter what her estate was. This definition is now limited to cases where she holds a life tenure only. In this section the old explanation 1, which seemed superfluous, has now disappeared.

The third alteration is occasioned by section 15 (b), for, under the old law if a share of a property were sold, whether by all the co-sharers or only a part of them, the rights to pre-empt were those of persons entitled to pre-empt a share, whereas now, if the sale of a share is made by all the co-sharers, the same rules are applicable as to the sale of the whole property by all the co-sharers.

(m). In section 16 (section 13 of Act II of 1905) there have been considerable changes in the drafting, and the word "contiguous" has been substituted for "adjacent," in clause sixthly, a change which effects

no alteration in the law, and the qualification "thirdly" in the old Act has been abolished.

(n). In section 17 there have been some verbal changes, in clause (c) "recognized subdivision" being substituted for *patti*. While the change was being made, it is difficult to understand why the same change was not made in section 15 (c) secondly, and why the order of estate and *patti* has been reversed in the section.

A great change has been effected in clause (e), which has the effect of abolishing in all cases to which the new Act applies the old principle of election. It now provides a complete series of rules for distribution and the old rules of division applied under Act II of 1905, when, at the last resort, the vendor refused to elect, *viz.*, *per capita* and in order of diligence are altered.

The principle of division according to superior diligence has entirely disappeared, and the very ancient rule of division "per capita" has been revived and made the rule for all cases not otherwise provided for.

(o). Section 22 provides, after slight re-drafting, that the Appellate Court may also demand a deposit or security from the pre-emptor, and it further provides, and this is a very necessary alteration, that the withdrawal of the deposit entails the dismissal of the pre-emptive claim.

It also provides that a fresh or increased deposit may be demanded if circumstances warrant the requisition, but it makes a very curious provision that, whereas the penalty for failing to furnish the first deposit demanded in the original Court is the rejection of the plaint, the penalty for failure to provide the fresh or enhanced deposit is a dismissal of the suit—a distinction for which there appears to be no justification.

It also provides statutorily for the case decided by the Chief Court to that effect that the Court has power to extend the date fixed for filing the deposit.

(p). Sections 23, 24 take the place of sections 20, 21, 26 in Act II of 1905 and relieve the Court of the necessity of framing formal issues, and place the *onus* on the pre-emptor as a condition precedent to his obtaining a decree, of proving that the sale is not one prohibited by the Punjab Alienation of Land Act, and that he belongs to the same group of agricultural tribes as the vendor of agricultural

land. The procedure is simplified, and the effect of the plaintiff failing to discharge this *onus* will be a dismissal of the suit, sections 21 (2) and 26 of the old Act disappearing as no longer necessary.

(*q*). Section 25 replaces section 22 with one change for whereas under the old Act the words ran "paid or fixed in good faith"—the section now reads "fixed in good faith or paid"—an alteration which is discussed in the Chapter on "Market Price and Price Payable."

(*r*). Section 26 redrafts section 23 for the words "due on the footing of the mortgage" the words "due under the terms of the mortgage" are substituted. The old words are retained, however, in section 27 (*a*), presumably through oversight. The effect is discussed in Chapter XI. The section also does away with the old rule that in foreclosure cases the Court could in all cases, where the amount due on the footing of the mortgage exceeded the market value, fix the market value as the price payable. This it can no longer do, with the result that an inflated mortgage account due under the terms of the mortgage, so long as it is claimed in good faith, will prevent the pre-emptor buying at the proper value, and will encourage mortgagees, who have no right to pre-empt, to let their mortgage claim run above the market value so as to fend off pre-emptors.

The alteration appears to be a regrettable innovation.

(*s*). Section 29 has a slight verbal change in clause (3) and provides a procedure for revision where no appeal lies, which was absent in the old Act.

(*t*). Section 28 of Act II of 1905 disappears, as, owing to efflux of time, it is no longer necessary.

No change has been made in the law of limitation, which was one of the main difficulties presented by the old Act.

CHAPTER III.

DEFINITIONS.

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 - (b). Agnates of females.
 - (c). Females not agnates.
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- (5). Contiguity of building on site to site.
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CHAPTER III.

DEFINITIONS.

1. Adjacent.

See *Contiguous*.

2. Agnate.

(a). A person is an agnate of another when he is related to him by descent from a common ancestor entirely and exclusively in the male lines.

No female can be an agnate, or transmit agnatic relationship.

Under Roman Law at one period, *viz.*, the later, a female could be an agnate, though she could not transmit agnatic relationship, but in the earlier period only males could be agnates, and this apparently is what is intended in the Pre-emption Act.—See P. R. 53 of 1912.

(b). The term agnate, however, as used in section 12 of Act II of 1905 when the property in suit had been sold by a female and to which she had succeeded through her husband, son, brother or father meant not her agnates, but the agnates of the person through whom she succeeded.

The same meaning applies to the phrase under section 15 (Explanation) only where the estate sold by her was one held by her on a life tenure. Where she holds in full proprietorship the agnates for the purposes of that section are her own agnates.

Her agnates must necessarily be the same as those of her brother or father, but the agnates of her husband or son are not her agnates. So that where she has obtained a full estate from her husband or son, the persons entitled to pre-empt are not their agnates, as was the case under the Act of 1905, but those of her father and brother who are her own agnates as well, if on her death they would be entitled to succeed.

(c). But, though she is in possession of an estate derived exclusively through the male line, she herself is not an agnate, and has no preference under 15 (b) secondly (see 12 (b) Act II of 1905).

As representing the estate, however, no matter if her own estate be a full one or only for life, she ranks as a co-sharer or landowner as the case may be (see Landowner), though if she is merely holding land by courtesy she is neither, and by virtue of section 15 (b) firstly she is now an heir, if entitled to inherit in the order of succession.

Though the Act of 1905 was silent, presumably the word "agnate" in section 11 had the same meaning as in section 12 of that Act.

Rulings that an agnate does not include a female.

(i). P. R. 89 of 1892.

"*Aulad*" or "*aulad narina*" denotes male collaterals and not persons related through females.

(ii). P. R. 131 of 1892.

The widow of a collateral is not a relation entitled to pre-emption as the right is confined to male collaterals.

(iii). F. R. 139 of 1892.

The widow of a deceased collateral is not a *bhai nazdiki* entitled under the *Wajib-ul-arz* to pre-empt.

(iv). P. R. 83 of 1893.

B. was the first cousin of A., through his mother being sister of A.'s father. B. was held not to be a *yakjaddi*.

(v). P. R. 95 of 1901.

A female cannot come under the designation of *sharik*.

(vi). P. R. 39 of 1902.

A married Arain woman, who has merely received a portion of her father's land as a gift and not by succession, cannot be held to have a preferential right of pre-emption over another Arain proprietor in the village on the ground that she comes within the term "*yakjaddi shikmi sharikan*" as regards the brother's property which her brother holds in right of succession.

(vii). P. R. 20 of 1881.

Quere.—Does "*rishtidar*" and "*yiganah*" apply exclusively to male relatives and those descended through males, or does it include also female relatives and those related through females?

In applying these rulings care should be taken to note that they are under the Punjab Laws Act. They are merely illustrative of the present statutory rule. They illustrate that no woman or one descended through a woman can be an agnate, but the rulings should not be extended beyond that and simply because in these cases women and those related through women were held not to be entitled to succeed, that is no reason for holding they cannot now succeed in a pre-emption suit under 15 (a) and 15 (b) firstly and thirdly as heirs, or as co-sharers or owners in the estate, in case they are, under their customary or personal law, heirs of the vendor or they are co-sharers or landowners in the estate.

(viii). An interesting case, which is hardly likely to recur is

P. R. 53 of 1912.

In 1885 plaintiff and his two brothers H. D. and A. D. (Bannias) jointly bought land in M. Damla and other villages and were recorded as owners.

In 1890 they effected a partition under which Damla fell to the share of H. D. and A. D. and the latter having died his share was entered in the name of his widow. In 1896 the widow died and mutation was effected in the name of plaintiff H. D.

In 1907 plaintiff brought the present suit for pre-emption in respect of a sale effected on 3rd December 1906 relying on the proviso to section 11.

Held, the widow of his brother A. D. was not an agnate and consequently plaintiff was not recorded for 20 years previous to the date of sale either in his own name or that of an agnate and his suit must therefore fail.

3. Agricultural Land.

(a). Section 3 (1), Act II of 1905, stated :—

“Agricultural land shall mean land as defined in the Punjab Alienation of Land Act, 1900, and includes any right of occupancy acquired or existing under the Punjab Tenancy Act, 1887, or under any earlier law.”

The same section in the Act of 1913 reads “Agricultural land shall mean land as defined in the Punjab Alienation of Land Act, 1900 (as amended by Act I of 1907), but shall not include the rights of a mortgagee, whether usufructuary or not, in such land,”

It will be seen the two sections differ in two respects but there is no change in effect. The inclusion of occupancy rights in the old definition was a superfluity, as there is no question, in view of the definition of land given in the Punjab Alienation of Land Act, that agricultural land includes a right of occupancy; and the insertion of the clause relating to mortgagee rights removes an anomaly in drafting, for whereas agricultural land under the Land Alienation Act included mortgagee rights (*vide* P. R. 6 of 1903 Rev. and 12 P. R. of 1911) and that definition was bodily incorporated in the Act of 1905, mortgagee rights were not pre-emptible, not being a permanent alienation of the nature of a sale, and there seemed to be a verbal inconsistency in the Act which has now been removed.

(b). The definition of “land” given in section 2 (3), Punjab Alienation of Land Act, 1900, as amended by Act I of 1907 runs :—

“The expression ‘land’ means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes :—

- (a) the sites of buildings and other structures on such land ;
- (b) a share in the profits of an estate or holding ;
- (c) any dues or any fixed percentage of the land revenue payable by an inferior to a superior landowner ;
- (d) a right to receive rent ;
- (e) any right to water enjoyed by the owner or occupier as such ;
- (f) any right of occupancy."

This definition of "land" for the purposes of pre-emption is entirely new. Under the Punjab Laws Act land for the purposes of pre-emption meant land in the dictionary sense of the word.

Authorities :—

P. R. 22 of 1906, P. R. 27 of 1907, P. R. 51 of 1907.

Lands in section 10 (b), Punjab Laws Act, means lands in the dictionary meaning and not lands in the meaning attached to it in the Punjab Tenancy Act.

(c). The definition appears to expressly exclude the whole of the buildings in the *abadi deh*, which will fall under the heading of "village immoveable property," and in fact all buildings of any sort or description, but it includes the sites, as distinguished from the buildings, on which buildings subservient to agricultural purposes are erected.

(d). The expression land includes :—

- (i) fruit gardens in the *gora-deh*—P. R. 111 of 1890,
- (ii) wells and lands attached to wells when used for irrigation of agricultural land—P. R. 62 of 1891,
- (iii) a proprietary share in a well—P. R. 40 of 1893,
- (iv) a *mugarrardari* tenure—P. R. 16 of 1905,

but it does not include

- (i) reversionary rights in land—P. R. 18 of 1897,
- (ii) land reserved as a village graveyard—P. R. 20 of 1892,
- (iii) trees on land apart from the land—P. R. 46 of 1893,
- (iv) water-tank used for watering cattle and excavation for bricks, P. R. 48 of 1898.

(e). Property included in sub-clauses of definition :—

(a). Sub-clause (a) does however include—

- (i) the site of the *abadi deh*—P. R. 51 of 1907,
- (ii) sites of *kurtis* on *gair-mumkin* land or *baras* outside the *abadi*—P. R. 12 of 1907,

but not

- (i) sites of corn-mills—P. R. 41 of 1892, P. R. 77 of 1904.
- (ii) sites of compounds in the *gora-deh*—P. R. 111 of 1890.

The expression would, I take it, include the sites of such structures as protective bands, *chappars* erected for protection from the weather in the fields, cattle sheds, threshing floors and the like, being purposes subservient to agriculture.

(β). Sub-clause (b) applies only to the right to a share of produce but not to the actual material share of the produce itself.—P. R. 14 of 1905.

(γ). Sub-clause (c) reproduces the ruling P. R. 61 of 1876, which runs:—

“An allowance of 10 per cent. on the revenue of a village, secured by settlement, is immoveable property, being a benefit arising out of the land under section 9, Act IV of 1872 and therefore subject of pre-emption,”

but as in (b) it is the incorporeal right which is land, not the actual money received in recognition of that right.

(δ). Sub-clause (d) also refers only to the right to receive rent and not to the actual money or *battai* rent received.

(ε). Sub-clause (e) reproduces P. R. 11 of 1898 which runs:—

“As the water of a perennial stream comes out of land the right to use such water for irrigation is a benefit arising out of land, and is therefore immoveable property under section 2 (5), General Clauses Act, 1868, so as to found a suit for pre-emption in respect of a sale thereof under section 9, Punjab Laws Act.”

(θ). Sub-clause (f) extends the meaning of occupancy rights subject to pre-emption to include all such rights whether transferable or non-transferable.

Under clause 10 (b), Punjab Laws Act, the only presumption allowed regarding occupancy rights was that the custom of pre-emption extended to transferable rights, though a custom might be proved to exist with reference to non-transferable rights.

By including all rights of occupancy in the definition of land, and by making all agricultural land subject to pre-emption, such rights are brought within the scope of the pre-emption law as a matter of course.

The following are the authorities, now of academical interest, to the effect that there was no presumption that the right of pre-emption existed on the sale of a non-transferable right of occupancy.

P. R. 67 of 1874, 196 of 1882, 120 of 1883, and 179 of 1888.

In P. R. 196 of 1882 (a case from *mauxa* Kutba, District Attock) a custom was proved allowing pre-emption in such cases.

(f). It should also be noticed that it is immaterial where the agricultural land is situated, whether in a town or village, *vide* P. R. 26 of 1912 and C. A. 738 of 1908 (p. 36), and that the period to determine whether it is agricultural land or not is the date of the sale and not

a subsequent date, so a later transformation of the property does not affect it.

P. R. 26 of 1912.

The fact that agricultural land had since the date of sale been built upon by the vendee, could not alter its character so as to affect plaintiffs' right of pre-emption.

4. Agricultural Tribe. Member of—

Group of—

(a). Under section 3 (4), Pre-emption Act, the terms "shall have the meanings assigned to them respectively under the Punjab Alienation of Land Act, 1900."

The Punjab Alienation of Land Act does not define the terms but in section 4 states :—

"The Local Government shall, by notification in the local Official Gazette, published with the previous sanction of the Governor-General in Council, determine what bodies of persons in any district or group of districts are to be deemed to be agricultural tribes or groups of agricultural tribes for the purposes of this Act."

(b). Under this authority two sets of notifications have been issued, one declaring certain tribes within the limits of individual districts to be agricultural tribes and grouping all tribes within such district as an agricultural group, and the other declaring a particular tribe residing in various districts to be an agricultural tribe, excluding such tribe from the district agricultural group.

These two sets of notifications are given in Appendices I. A.—I. B.

(c). The only rulings under the Act refer to the exclusion of certain tribes from or inclusion in the list. They are :—

P. R. 24 of 1908.

Mahtams of Muzaffargarh District are not members of an agricultural tribe for the purposes of the Punjab Pre-emption Act of 1905.

P. R. 117 of 1908.

Kharals of Hissar District are not members of an agricultural tribe.

P. W. R. 26 of 1909.

Hanjra Jats of Multan, possibly formerly Mochis, are members of an agricultural tribe.

(d). Notification of a tribe after institution of suit as an agricultural tribe will not make a member of such tribe entitled to pre-empt. This

is in strict accordance with the rule of law that a pre-emptor must possess his statutory qualifications at the time of sale, P. R. 7 of 1910.

In a pre-emption suit filed in 1902 held, inasmuch as the plaintiff belonged to the Koreshi tribe, which was not notified as an agricultural tribe under Act XIII of 1901 until 1904, he had no right of pre-emption at all at time of suit, and therefore his suit must fail.

5. Cantonment.

A cantonment is a place which, under Section 4 (1), Act XIII of 1889, the Local Government has, with the previous sanction of the Governor-General in Council, by notification in the Official Gazette, declared to be a cantonment.

The cantonments in the Panjab will be found on p. 2395 of Rattigan's Acts and Regulations, Vol. III, together with the Notifications establishing them.

6. Common Entrance from the Street.

a. No definition of this term has been given in the Pre-emption Act, and both parts of the phrase "common entrance" and "street" have to be considered together.

The definition of "street" in the Punjab Municipal Act XX of 1891 will probably be the safest one to adopt as was done in P. R. 44 of 1912.

Section 3 (4) of that Act defines it as :—

"Street" includes any way, road, land, square, court, alley, passage or open space, whether a thoroughfare or not, over which the public have a right of way, and also the roadway and footway over any public bridge or causeway.

The essence of the term, therefore, is a space to which the public has, as of right, access, and would not include a private way.

(b). The next question that arises is as to what is a "common entrance". It undoubtedly includes a common doorway or *deohri*, and I think also there is no doubt that where there is a common *sahin* or court-yard opening on to a street there would be a common entrance.

But, suppose, instead of a common *sahin*, there is a private alley or *kucha* on to which various houses open, and that *kucha* opens again on to a public street, would that be a common entrance? The private *kucha* would not be a "street" because the public would not as of right have an access thereto. Again, suppose there was a common entrance opening on to a private *kucha*, would that be a "common entrance from the street"?

The matter is not free from difficulty, and each case will have to be decided on its merits.

The published rulings give little assistance.

In P. R. 113 of 1881 it was held that, unless the *sahin* was common, there was no preference; in P. R. 192 of 1888 the opening on to a private lane of the pre-emptor's house and the vendor's house was held to give no preferential right; and in P. W. R. 254 of 1912, it was held that it is not sufficient to prove that the street into which the house sold and the house of the person claiming pre-emption open is common to the two properties, and that each has an entrance from the street; but there must be an entrance from the street common to both properties, and that a public street leading from the main road is not a common entrance. But it was indicated in this judgment that, if the road leading from the main road was private and jointly owned, there might be some force in the argument that such private road was a common entrance.

So far, therefore, it would seem that a common court-yard opening on to a main street would be a common entrance, but a private *kucha* would not necessarily be a common entrance. Such *kuchas* are extremely common in large cities and are frequently gated off from the public.

The difficulty that arises is, whether the private *kucha* could be considered as a "street". Under the Municipal Act it certainly would not be, even if the Municipality had access to it for sanitary purposes, but if it is neither a common entrance or a street, we would have the anomaly that whereas two houses opening by a common entrance on to a street would entitle each owner to pre-empt the property of the other under section 16 (fourthly) that clause would not be applicable to the case where there was a common entrance on to a private *kucha*.

That is to say, the property where privacy was greater would be in a worse position than the property where the privacy was lesser.

It is possible that the Legislature intended the word "street" to apply equally to public and private ways, but there is no indication of such in the Act.

There is no difficulty, however, where the *kucha* is only a blind alley and is open to the public without any indication of private property therein—in such a case the *kucha* is not a common entrance.

P. R. 44 of 1912.

Where the pre-emptor's house and the house in dispute both opened into a blind alley (*kucha sarbasta*) and into the same alley opened two other houses,

and it was not shown that the alley was the private property of the owners of the four houses or that none except those persons had free access to it or a right of way over it,

held, the entrance to the alley was not a "common entrance from the street" of the pre-emptor and vendor.

7. Company.

The expression "Company" means a company registered under the Indian Companies Act, 1882, or under the English Companies Acts, 1862 to 1890, or incorporated by an Act of Parliament or by the Governor-General in Council or by Royal Charter or Letters Patent.

(Section 3 *e*. Land Acquisition Act I of 1894).

8. Contiguous.

(a). The word "contiguous" in section 16 replaces the old word "adjacent" in section 13, Act II of 1905, as, though the generally accepted meaning of adjacent had come to be regarded as equivalent to "contiguous," (see Rattigan, J., in P. R. 90 of 1909), its philological meaning was different.

No change in the law has been affected by the alteration.

The word means "actually touching" or adjoining.—See P. R. 83 of 1880 and P. R. 90 of 1909.

(b). It should be noted—

(1). That, though there were cases under the Punjab Laws Act where proximity gave a right of pre-emption (a right not allowed under the present law), adjacency and contiguity do not include proximity and consequently in the following cases proximity was held not to confer any right, it not being adjacency.

(i). P. R. 83 of 1880.

Claimant's house was 2 doors off.

(ii). P. R. 189 of 1882.

Claimant's house was on opposite side of road in a blind alley.

(iii). P. R. 56 of 1885.

Claimant's house was on opposite side of road.

(iv). P. R. 192 of 1888.

Claimant's house opened into same street.

(v). P. R. 82 of 1889.

Claimant's house was in same blind alley, but on opposite side of road.

(vi). P. R. 199 of 1889, 10 of 1886.

The purchaser who resisted owned a house in same *mohalla*.

(vii). P. R. 109 of 1900, 44 of 1903.

Claimant had a house in the same *mohalla*.

(viii). P. R. 68 of 1906.

Claimant had a house in same blind alley but on opposite side of road.

- (ix) P. R. 47 of 1907.

Claimant had a house on opposite side of road.

Contra—

- (i). P. R. 108 of 1886.

Claimant had a house in same narrow way, his front door being opposite the front door of house sold.

- (ii). P. R. 10 of 1886.

By special custom, resident in *mohalla* found to have right.

- (iii). P. R. 107 of 1900.

It is not necessary to prove contiguity. Ordinarily vicinage is sufficient. Claimant had house opposite, and it was held to suffice without proof of special custom.

- (iv). XXXI All. 519.

Where one house adjoins a house sold and another is merely separated by a lane not being a thoroughfare, both are contiguous.

(2). A house adjoining on the back is as much contiguous as a house touching elsewhere. So, too, is a house touching on one side.

- (i). P. R. 138 of 1884.

The fact of plaintiff being a neighbour on the east side gives him no superiority over the defendant, who is also a neighbour on the north.

- (ii). P. R. 83 of 1888.

The owner of a house at the side of the house sold has no preference over the owner of a house at the back.

- (iii). P. R. 82 of 1889, 199 of 1889, 88 of 1905, 81 of 1906, 140 of 1906.

The owners of houses adjoining at the back and opening into another *mohalla* have a superior right to persons whose houses are in same street but do not adjoin.

- (iv). P. R. 36 of 1897.

Plaintiff's house adjoined on south and east and opened into the same street, while defendant's adjoined at the back west and north and opened into another street. Held, plaintiff had no superior right.

- (v). P. R. 17 of 1903 and 67 of 1906.

Plaintiff held to have failed to show that the owner of a house adjoining house sold and opening into same street had a preference over person owning house at back and opening into different *mohalla*.

Contra—

- P. R. 105 of 1887.

Plaintiff's house adjoined on both sides, the only access to his house being by passing in front of the house sold. Defendant's house adjoined on back and opened into another *mohalla*. Held, this difference gave plaintiff a preferential right.

(3). It is not necessary that any particular form of contiguity should be proved.

- P. R. 33 of 1835.

Plaintiff whose wall was one of the boundaries of the property in suit established a custom based on vicinage. Defendant contended that the right only existed when the wall was joint or the door opened into the same street, or rafters rested on the same wall, or relationship.

Held, defendant had failed to prove these limitations, and that contiguity was sufficient to confer the right.

(4). Length of contiguity does not affect matters, *i. e.*, if two claimants have property contiguous to the property sold one is not to be preferred to the other merely because the length of contiguity is greater in his case than in the other. P. R. 17 of 1889, 83 of 1888, 32 of 1899, 44 of 1903.

(5). A building on a site, which gives the owner of such building the right to pre-empt the site under it under section 16, secondly, is contiguous also to the land adjoining such site.

P. R. 10 of 1909.

The case was one where the *amladar* sued to pre-empt the site under his *amla*, which had been sold as part of a large area. Held, the plaintiff was entitled to and should have laid claim to the whole area sold, as his building was also adjacent to the adjoining land.

(6). Where two separate properties adjoining one another are sold together, a person whose house adjoins one of these properties has not got a right to pre-empt the other property on the ground of contiguity.

(i). P. R. 112 of 1907.

In the case of a sale of two houses adjoining one another a vendee, whose right of pre-emption by reason of contiguity only extends to one house, cannot defeat the next-door neighbour of the second house on the ground that by reason of his having rights over one house superior to plaintiff he has a right with respect to the other house equal to those of plaintiff.

Plaintiff's right to sue arose on the sale of the two houses and at that time plaintiff's house was not contiguous to the furthest property. It seems to us more than doubtful whether the argument is sound, whereby the defendant utilizes his purchase of house number one as giving him a right to pre-empt house number two. Such a method of dealing with the matter would, in our opinion, lead to absurdity in the case, to take an illustration, of the sale of a row of 20 houses, to one of which a party's house was contiguous.

(ii). P. R. 90 of 1909.

Chatterji and Rattigan, J. J.

When two houses which adjoin one another are sold jointly, the right of pre-emption of the house which adjoins only one of the houses sold extends to that house only, and not to both the houses sold.

Contra—

P. R. 90 of 1909.

Chevis, J. :—

In my opinion wherever the right of pre-emption depends on contiguity, a plaintiff can claim to pre-empt so much as lies in a ring fence adjoining his own property. He is only stopped when he comes to something which is entirely cut off from his own property by reason of property intervening, which,

whether it belongs to the vendor or to any one else, is not included in the sale deed.

This rule at first sight seems in conflict with the rule that size of property is no hindrance to the exercise of the right of pre-emption, but the differentiating principle is whether the property sold is one or distinguishable properties.

See P. R. 140 of 1906.

Where a property was sold, which was in reality one house with five compartments separately occupied and separately assessed under different ward numbers, all being under one roof and approached by a common entrance, held it must be regarded as one property.

The question therefore, whether the property sold is one property or several distinguishable properties, is a question of fact to be decided with reference to each particular case.

9. Co-Sharer.

(a). No definition of the term co-sharer is given in the Act.

For the purposes of the Punjab Pre-emption Act, a co-sharer may be defined as a person who with others holds land or property jointly (*vide* definition of property held jointly) in such a way that none of the co-owners can be said to be the exclusive owner of any particular area thereof or to be excluded from the ownership of any portion.

It should be remembered also that the word co-sharer, as used in the Pre-emption Act, has a slightly different meaning to the term co-sharer used by the Allahabad Court in several instances, where it occurs as the translation of the term "*hissadar*" or member of a village community.

(b). The following persons have been held to be co-sharers.

1. Members of a joint Hindu family.

(i) V All. 158 ; VII All. 184.

(ii) P. R. 35 of 1908.

Where the property, on the ownership of which the right to pre-empt is based belongs to a joint Hindu family, the right to pre-empt under section 13 (7) vests in every co-sharer in such property.

2. A purchaser from a co-sharer is a co-sharer of the other co-sharers.

(i) P. R. 42 of 1880, P. R. 16 of 1881, P. R. 89 of 1900.

(ii) P. R. 87 of 1891, F. B.

A village was founded half by a Mussulman and half by a Hindu jointly. The Mussulman founder sold $\frac{1}{2}$ of his $\frac{1}{2}$ to another Hindu, the entry being—

Sons of the Mussulman founder	...	...	$\frac{1}{4}$
Hindu purchaser	...	...	$\frac{1}{4}$
Sons of Hindu founder	...	...	$\frac{1}{2}$

One son of the original Hindu founder sold his share to A, a stranger, another son sued to releem, whereupon A sold his mortgage to the Hindu purchaser.

Held as the village was undivided the Hindu purchaser was a co-sharer.

3. *Tarradadkars, chakdars and muqarridars* in their tenure.

(i) P. R. 44 of 1870.

In Multan district where the *chakdari* tenure prevails the co-sharers in a well have the right of pre-emption to the shares in the well in preference to a general proprietor in the village who has no such share, but merely receives a *haqq zamindari* payable by the *chakdars*.

(ii). P. R. 40 of 1904.

Where a person holding as *tarradadkar* sells his right to an owner in the joint holding and another *tarradadkar* holding the same rights in the plot as the vendor sues on the ground that he has preferential rights to pre-empt *tarradadkari* rights, held that as the *tarradadkari* tenure in question conferred on the *tarradadkar* full proprietary rights to half the land and well jointly with the original proprietor, plaintiff's title was that of a co-sharer in the joint holding with the vendor and vendee, but he was bound to prove that as a *tarradadkar* co-sharer he had superior rights to another kind of co-sharer.

(iii). P. R. 16 of 1905.

A sold along with other land his *muqarridari* rights in village D to G, who was his landlord on other lands also sold at the same time.

B, brother and co-*muqarridar* of A, sued to pre-empt.

Held, as the vendee was not a proprietor in the *muqarridari* holding in D, the claim was governed by section 12, Punjab Laws Act, and the tenure being superior to that of occupancy rights, B as a co-sharer with the vendor had a preferential right under clause (a).

(c). The following persons have been held not to be co-sharers where the family is not a joint Hindu family.

(1). A brother *qua* brother.

(i). P. R. 100 of 1900.

A brother holding no land in a village is not, *qua* brother, a co-sharer of a brother holding land.

(In the particular case the purchasers of the land were two brothers, whose father held ancestral land in the village, of whom one was a proprietor by purchase in the village and the other had no property of his own, but based his rights on the ground that he was the brother of the vendee and also heir with vested reversionary interests to the ancestral property, situate in the village, which was in possession of his father.)

(2). A son *qua* son (though he has a right to pre-empt as an heir.)

P. R. 38 of 1875, P. R. 82 of 1880, P. R. 100 of 1900, N.W.P.S.D.A. Rep. 1865, pp. 71 and 251, XVII All. 454, XIX All. 311.

Compare, however—

XXXI All. 630.

A son of a co-sharer cannot be said to be a stranger, the co-impleading of whom as a plaintiff by another co-sharer would cause the forfeiture of such plaintiff's right to sue.

(3). Any heir *qua* heir during life of owner.
V. All. 65.

(4). A wife *qua* wife.
V. All. 65.

(5). An *ala malik* in an *adna* tenure.
64 P. R. of 1904.

An *ala malik*, who is entitled only to a fixed percentage on the revenue and has no concern in the internal economy of the *adna kandi*, is not a co-sharer with the *adna maliks* in the meaning of section 12 (a), Punjab Laws Act.

(6). Government holding a share by purchase.
XXVIII All. 235.

When Government has acquired land permanently in a village it does not become a co-sharer in the village to which the land originally appertained, and on a sale thereof by Government, held that the conditions in the *Wajib-ul-arz* as to sales by co-sharers in the village are inapplicable.

(7). A co-sharer in a well as regards lands irrigated therefrom.
(i). P. R. 107 of 1882, F. B.

There is nothing in the express provisions of Act IV of 1872 which gives to a co-sharer in a well, as such co-sharer, a right of pre-emption over land, which, being the separate property of a co-sharer in the well, is watered from such well, but it may be by custom that he has such right.

(ii). P. R. 44 of 1900.

In absence of proof of custom a co-sharer in a well has *ipso facto* no preferential right over land watered by the well, even in a case where formerly the whole land watered by the well was jointly owned by the co-sharers in the well.

But see P. R. 30 of 1887 which appears to assume a person is a co-sharer in land attached to a well if he be a co-sharer in the well.

(8). A co-sharer in the village site as regards a house built thereon.

P. R. 85 of 1893.

A co-sharer in a house in the *abadi* has a preferential right to purchase a share of the house sold over co-sharers in the village including the site.

(9). A purchaser of a share in execution before confirmation.
XXXIII All. 45.

With reference to section 316, C. C. P. a purchaser at auction sale in execution of a decree of a share in *zamindari* property does not become a co-sharer in the *Mahal* in which such property is situate until the sale has been confirmed in his favour.

See also "Land or property held jointly."
"Landholder."

"Retention of qualifications" (Chapter IV, Nature of the Pre-emptive Right.)

10. Decree for money or Order of a Civil, Criminal or Revenue Court or of a Revenue Officer.

(a.) The Act of 1913 confines the operation of section 3 (5), so far as decrees are concerned, to decrees for money, whereas under Act II of 1905 all decrees were included. The amendment gives effect to cases like that dealt with in P. R. 40 of 1911,

P. R. 40 of 1911.

One J sold part of a minor's property, guaranteeing to make it good out of his own land, if the minor repudiated. The minor did repudiate and the vendees got a decree on the guarantee.

Held the latter suit was in effect one for specific performance and the decree *per se* did not effect a sale. The transfer was not complete until execution, and then it fell within the exception given in section 3 (5).

The terminology of the section leaves something to be desired, as there can be no such thing as a decree of a Criminal Court or of a Revenue Officer.

An order having the force of a decree can be made by a Revenue Officer in the case mentioned in section 33, Tenancy Act, but not otherwise.

Decree is defined in section 2 (2) Civil Procedure Code thus :—

“Decree means the formal expression of an adjudication which, so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final.”

Order is defined in section 2 (14) of the same Code thus :—

“Order means the formal expression of any decision of a Civil Court which is not a decree.”

(b.) The following are the sales which can be carried out in execution of decrees or orders.

1. Under the Civil Procedure Code.

(i). Sale of property of person summoned to attend Court, who does not attend, under section 32 (b) and O. XVI 12.

(ii). Sale in execution of decree under Part II and O. XXI.

(iii). Sales to enforce a temporary injunction under section 94 (c) and O. XXXIX 2 (4).

(iv). Sales to enforce the performance of the duties of a Receiver under section 94 (d) and O. XL 4.

(v). Sales to prevent waste under O. XXXIX r. 1.

(vi) Sales by a Receiver acting under authority of Court under O. XL r. 1. (i) d.

2. Under order of Criminal Courts.

- (i). Sales of property of absconding persons attached under section 88.
- (ii). Sales of property to recover costs of act done under section 140 (2).

3. Under decrees or orders of a Revenue Court or Revenue Officer.

- (i). Sales in execution of decrees.
- (ii) Sales for the recovery of arrears of land revenue and other dues under section 67 (g), (h), 75, 77, 97, 98 and 103 (3), Land Revenue Act.
- (iii). Sales for the recovery of rents and penalties under section 30 (5), Tenancy Act, and to recover compensation for improvements under section 74 (1).

4. In addition to these decrees and orders, there are several others which may be passed by the Courts, *e.g.*, sales in Insolvency proceedings, under the Guardian and Wards Act, the Indian Companies Act, etc.

(c) It has been ruled by the Chief Court that the word "Order" is not to be construed only with reference to its definition in the Civil Procedure Code, but must be taken to include any direction whereby property under the control of the Court is sold. The particular case refers to a sale under "directions" of an Insolvency Court by the Official Receiver.

P. R. 46 of 1909.

Sale of immoveable property by a Receiver under direction of the Court under section 356, C. C. P., is a sale in execution of an order of a Civil Court in the meaning of section 3 (5), Pre-emption Act, and is consequently not subject to pre-emption.

The words "in execution of an order" are equivalent to "in compliance with or in obedience to an order."

In accordance with the principle of this ruling, a sale by an Official Liquidator, when the winding-up of a Company is under the orders of the Court, would not be liable to pre-emption, nor probably would a sale made by a Liquidator acting in a winding-up under the supervision of the Court, but presumably where the liquidation was outside Court and voluntary, any such sale made would be subject to pre-emption.

This ruling of the Chief Court is opposed to the ruling of the Allaha-bad Court under similar circumstances :—

XXVII All. 670.

Where, in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction, certain revenue-paying property of the insolvent was sold by the Collector by private contract, and not at public auction, held that such a sale did not oust the pre-emptive rights of such persons as were

otherwise entitled to claim pre-emption. There is nothing which suggests that a sale by a Receiver in insolvency can be effected in derogation of or to the prejudice of the rights of third parties.

11. Dharmsala, mosque or other similar buildings.

(a). No definition of these buildings has been given in the Act.

It should be noted that the exemption of such property, so far as the Act of 1905 was concerned, applied only to towns. In P.R. 80 of 1907, Chatterji, J., held that shops in villages were pre-emptible under the Act, but that *dharmsalas* and mosques, being *res extra commercium*, were not pre-emptible, though part of the property sold in P. R. 10 of 1909 comprised both a mosque and *shivala*.

Under section 5 of the Act of 1913 such property, wherever situate, is exempt from pre-emption.

“Other similar buildings.” These words do not mean property dedicated to the maintenance of a religious institution, as houses, plots of land, etc., which are attached to a mosque for the sake of their incomes.

The sub-section includes all buildings which are primarily devoted to the public celebration of worship or religious ceremonies, and would therefore include churches, chapels, mosques, *Idgahs*, *shivalis*, *dharmsalas*, temples, monasteries, etc.

Quaere, however, would the clause include such buildings as mission-halls, Arya Samajist meeting houses and the like, which are devoted not primarily to religious ceremonies but to discussion of religious and other beliefs?

(b) It should be noted, however, that the character of the property has to be looked to as it was at the time of sale, not what it subsequently became.

P. R. 22 of 1911.

Where at the date of sale the property sold was a house and immediately after it was converted into and used as a *dharmsala*, it is immaterial for the purposes of section 13 (2) to consider such conversion as it is the character of the property sold at the date of sale which determines the question of the applicability of the said sub-section.

12. Dominant and servient tenement,

Easement has been defined by Goddard as—

“A privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.”

The former tenement is called the dominant, the latter the servient tenement.

This author divides Easements into two classes, Natural Rights and Easements Proper.

In the former category he includes the right of support, and if that be an easement under the Pre-emption Act, then every building which is adjacent to another piece of immoveable property has an easement thereon, and consequently clause sixthly, section 16, would appear to be redundant, unless the words "dominant and servient tenement" have some special meaning in the Act not apparent on the face of it.

That the right of support is an easement has been judicially held in XXIV Bom. 414, but as it was not an appendage under Muhammadan Law the right was held to be inferior to that of a right to allow rain water to fall.

Ordinary Easements are :—

1. Easements of necessity, *i. e.*, privileges without which the owner of the dominant tenement could not enjoy his own property.

2. Particular Easements, such as easements of light, support, waterway, etc.

They are acquired by—

- (1). Grant, express or implied.
- (2). Act of Legislature.
- (3). Under a devise.
- (4). Prescription.
- (5). Custom.

See also Chapter VII, para. 8 (5).

18. Estate :—

Under section 3 (6), Punjab Pre-emption Act, the expression "estate" has the meaning assigned to it in section 3 of the Punjab Land Revenue Act 1887, which defines "estate" as :—

"Any area—

- (a) for which a separate record of rights has been made, or
- (b) which has been separately assessed to land-revenue, or would have been so assessed if the land-revenue had not been released, compounded for, or redeemed, or
- (c) which the Local Government may, by general rule or special order, declare to be an estate."

The term therefore practically includes all agricultural communities.

It should however be noted that where an estate is divided later into two or more separate estates, the new estates, and not the old one, are to be treated as the entity for pre-emption.

Under certain Allahabad rulings, though it would have been possible to show that the original right of pre-emption which existed in the primary

estate continued in the whole of the new estates by custom, the ordinary rule was that separation involved the extinguishment of the right as applicable to the whole original estate, notwithstanding the retention of certain appendages. These rulings will be found under the definition of "Land or Property held jointly."

It is almost unnecessary to say that the word "estates" in the Punjab must be applied not to pre-existing areas, but to the area forming an estate at the time of the sale.

14. Exchange :—

It is extremely difficult to draw the line between sales and exchanges.

The term "exchange" is defined in section 118, Transfer of Property Act, thus :— "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange."

This definition has been held by the Chief Court to be too wide in reference to the Law of Pre-emption.

(i). P. R. 29 of 1893.

Without attempting to define sale or exchange we entertain no doubt that a permanent transfer in a village for a sum of money, plus something that is not money does not, merely because of such addition, cease to be a sale within the meaning of the Act.

(ii). P. R. 97 of 1900.

The definition of section 118, Transfer of Property Act, is not altogether applicable to section 9, Punjab Laws Act. While I agree that a sale in which part of the consideration is paid in money and part in land or house property does not become an exchange, as contemplated by section 9, Punjab Laws Act, merely because the consideration is not all paid in money, I certainly think that the converse is true, and that an exchange is not a sale for the purposes of section 9, Punjab Laws Act, merely because the value of the properties exchanged is equalized by the addition of a comparatively small sum of money, or by the mere fact that two deeds of sale were drawn up contemporaneously, that being merely the method employed to arrange the transfer.

I think the principle deducible from the rulings above given is that the definition given in the Transfer of Property Act would stand, subject to the insertion of the word "mainly," instead, of "only".

Each particular case will have to be judged on its merits, and the rules for determining whether a particular transaction is an exchange or a sale are given in Chapter VI, paragraphs 8, 10, in which also particular instances are given.

15. Foreclosure :—

Foreclosure is the proceedings taken under Regulation XVII of 1806 by the mortgagee by way of conditional sale to divest the mortgagor of his proprietary rights in the land, and to vest them in himself.

The foreclosure is completed on the expiry of the year of grace. *Vide* Chapter XII, Limitation, para. 6.

16. Immoveable Property :—

(a). Immoveable property for the purposes of the Pre-emption Act means immoveable property within the limits of a village and within the limits of a town other than agricultural land.

(b). In Act II of 1905 the phrase was “within the limits of village sites” (see Village where the point is discussed).

Village sites meant the *abadi deh* ; and no immoveable property within the boundaries of a village other than agricultural land, if outside the *abadi*, fell under the definition of immoveable property. This anomaly has now been removed.

All immoveable property is, on proof of a custom of pre-emption, pre-emptible within the limits of a town, unless specially exempted.

(b). Immoveable property is defined in the General Clauses Act I of 1868 as follows (section 2 (5)) : —

“Immoveable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.”

Consequently reversionary rights in land, land reserved as a village graveyard, trees on land apart from the land, and water-tanks, not being agricultural land (*vide* definition of Agricultural land), are not pre-emptible if situate outside the *abadi*.

Within the village site such property would be apparently immoveable property, though the Transfer of Property Act excludes from the term “immoveable property” standing timber and growing crops or grass (section 3).

(c). “Attached to the earth” is defined in the Transfer of Property Act as—

- (a) rooted in the earth as in the case of trees and shrubs ;
- (b) imbedded in the earth as in the case of walls or buildings ; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached

(d) The following have been held to be immoveable property :—

Land, other than agricultural land.
 Standing buildings, P. R. 10 of 1909,
 Things which are physically incapable of being moved,
Haqq biswadari, P. R. 66 of 1876,
 Reversionary rights in land, P. R. 18 of 1897, though they are not land
 and are not subject to pre-emption,
 Rights of common and other profits in another's property,
 Incorporeal hereditaments not of a purely personal nature,
 Rents, pensions and annuities secured upon land,
 All allowances charged on revenue, XXIII Bom. 22,
 Easements, XXIV W. R. 300,
 Widow's interest in income arising from her husband's estate, XXIII
 Bom. 1,
 Mills owned by *maurusi* on landlord's land, P. R. 22 of 1906,

But apparently not.

Trees cut or standing, see Transfer of Property Act, section 3, and
cf. XIX Bom. 207 and XXII Bom. 610.
 Standing crops, *vide* C. C. P., section 2 (13), but *cf.* XIV All. 30, XV
 All. 304 and XI Mad. 193 under the old Civil Procedure Code,
 Cut crops, XXII Cal. 877 and XXV Cal. 692.

(e.) Immoveable property in towns includes all buildings. Shops, *katras*, *sarais*, *dharmsalas*, mosques and similar buildings cannot be pre-empted at all ; all other buildings can be, if a custom of pre-emption is shown to prevail in the town or sub-division where situated. Under the old law, the custom of pre-emption had to be shown to extend to the particular kind of property sold, but this is no longer necessary. Accordingly if the custom of pre-emption is once shown to exist in a particular locality, it is exercisable in respect of all immoveable property therein other than those statutorily exempted, and so might be applicable to buildings like factories, railway stations, flour mills, etc.

17. Inherit. Person entitled to—

(a). The term includes every person, who, in event of the decease of the existing holder of an estate, would be, under the personal or customary law applicable to the parties, entitled, either immediately or ultimately, to succeed to the whole or a portion of the estate of such person.

(b). It would be impossible within the scope of a book on Pre-emption to discuss the various rules of inheritance existing in the Punjab, but the following points may be noticed.

(1.) A woman is not excluded if she is by law entitled to inherit.

C. A. 1268 of 1907. P. W. R. 212 of 1912.

Where a widow has a right to succeed collaterally, she has a right to pre-empt under section 12 (a), which does not confine the right to agnates only.

(2.) Distance of relationship is no bar, so a collateral, no matter how distant he may be removed, is an ultimate heir. Consequently P. R. 121 of 1879 and P. R. 129 of 1906 are no longer applicable.

P. R. 21 of 1908.

Clause 12(a) confers the right of pre-emption on the whole line of heirs, and not merely on the next or nearest at the time of sale,

(3.) Possession of land in the village where the property in dispute is held is no longer necessary to constitute a man an heir. Consequently P. R. 69 of 1885 is no longer applicable.

Cf. P. R. 12 of 1908.

Jointness of holding is not essential to the status of *sharik-i-shikmi*, the term being applicable where the family bond of union still exists.

(4.) A person does not cease to be an heir merely by virtue of change of religion.

P. R. 62 of 1895.

Contra : —

P. R. 13 of 1885.

Plaintiff was a Muhammadan, the vendor a Sikh. Plaintiff's branch of the family had been converted from Hinduism many generations back, held, under such circumstances, the family having separated so widely and so long ago, plaintiff could not succeed as *yakjaddi* of vendor.

(5.) The term includes the heir of a donor.

P. R. 131 of 1908.

In case of a sale of agricultural land by descendants of a donee, the heirs of the donor, in the absence of a claim by other descendants of the donee, can claim pre-emption under section 12 (a).

This is because there is always an ultimate reversion to the donor's line.

(6.) It is not necessary that the common ancestor (except in cases of occupancy tenants) should have held the land.

18. Jointly and severally.

See also Chapter VII, para. 7 (13) (14) (15).

The words which occurred in sections 12 and 13, Act II of 1905 have now disappeared from the corresponding sections in the Act of 1913 and section 13 of the latter Act makes it clear that a right vested in a class or group of persons can be exercised by them all jointly, or by any member of them jointly, or by each person severally.

It should be noted, however, that this section does not create any preferential rights *inter se* of the persons entitled. Failing a suit by the whole of the jointly entitled persons, in separate suits brought by

any number of them, though the suit must be framed in each case to cover the whole bargain, the division among the claimants will be according to the rules of section 17 and two co-owners suing will have no preference over one suing separately.

19. Joint-owners :—

This phrase is used only in section 10.

The phrase includes co-sharers and all persons owning property together.

The word “joint owners” appears to be equal to “co-owners”, whether their shares in the property are ascertainable or not, and should not be limited to persons holding jointly.

Thus suppose A owns part of a house and B another part, their portions being ascertainable they are not persons holding jointly, but under this section they would neither be entitled to pre-empt the other's share if they conveyed their property as one whole.

20. Katra :—

(a). No definition of the term is given in the Act.

There is some difficulty in determining what the term implies, inasmuch as it is applied to totally different classes of property in different towns. As it is intended to be used in the Act, I doubt if such a thing as a *katra* exists outside Delhi and Lahore *ipso nomine*.

In Amritsar a “*Katra*” is nothing more or less than a *mohalla* or sub-division of a town, and the very same word is used in one instance in the same meaning in Delhi, in the case of the *Katra Nil*.

It goes without saying that it was not intended to legislate under the name *katra* in regard to such places.

The common form of a *katra* in Delhi is a small square with shops on all four sides and an open space in the middle, and with an arched or other exit on one side into the street.

These open spaces are usually used for the reception of piece-goods (rarely any other commodity is stored in them) in bulk, and the shops around the space are usually the central distributing agencies for the trade.

But there are other kinds of *katras* also well-known as such in Delhi itself. For instance, a *katra* may have nothing to do with trade at all, but be simply a square of houses identical in appearance to what may be called a trade-*katra*.

Again there are *katras* which have both shops and houses inside, and, instead of having a vacant space in the centre, that space may itself be occupied with booths or be built upon,

Again the term *katra* is applied to a conglomeration of huts or houses round which there is no enclosing wall at all and whose boundaries are defined simply by a large jhot or drain.

All these kinds of *katras* actually exist, and it is difficult to say to which kind the prohibition in the Act refers.

The primary meaning of "*Katra*" given by Platts in his Dictionary is an "enclosure", and the secondary meaning is "market", and this definition undoubtedly applies to *katras* in Delhi.

The very language of the Act itself helps to confuse the issue. If by "*Katra*" is meant strictly a trade-*katra*, the general features of which I have mentioned above, then it was quite unnecessary to draw a distinction between *katra* and shop as has been done in section 5 (a), for, if a shop is not liable to pre-emption, then a group of shops, no matter how built, would be not liable. If that is the sense in which the word is used the prohibition is superfluous.

If we assume that the Legislature meant something else and that the Act is not redundant, then if a custom of pre-emption exists in regard to the sale of a house, on what principle is a house which is situate in an enclosure with shops not pre-emptible, while a house in an open bazar surrounded on all sides by shops may be pre-emptible? Again if the *katra* be an entirely residential one (and though there have been no rulings by the Chief Court on that subject, there are rulings of the Delhi Divisional Court treating a residential *katra* as a *katra*), why, in view of P. R. 108 of 1895 that size of property has no effect on the right of pre-emption, should a group of houses so situated be exempt as a whole and individually, when by custom each particular house in a group somewhat differently constructed be pre-emptible?

I take it that whatever a *katra* may mean the prohibition will apply to one building therein just as much as to the whole, though here again the Act lends us no assistance.

It is, I regret, impossible to give any assistance on this subject. What really is meant by "*katra*" it is impossible to say, and until there is some clear definition on the subject, showing either that the use of the word "*katra*" is redundant in the Act or that it means something more than a collection of shops grouped together, it is of little use attempting to lay down any rule.

(b). The following rulings of the Chief Court show in particular instances what were treated as *katras* or not prior to the Act of 1905, but they are of very little assistance in the present state of the law, for under the old law proof had to be given that the property in suit

was of such a nature as to be subject by custom to pre-emption, and whereas individual shops might be pre-emptible in a town, it by no means followed that a large group of shops in the shape of a *katra* would be.

All the rulings show that where property was regarded as a *katra* pre-emption was disallowed.

The rulings given show varying definitions of *Katras* :—

(i). P. R. 64 of 1887.

Plaintiff having a house adjoining a *katra* failed to prove that any right of pre-emption attached by custom to the sale of a *katra*.

“A *katra* appears to be a number of shops built together in the form of a *serai* with an open square in the middle.”

(ii). P. R. 2 of 1903.

Plaintiff sued to pre-empt, by virtue of his having a house adjacent to a portion of the property sold, in respect of a sale of a large property known as *Pari Mahal*, Lahore, formerly a Mohammadan nobleman's house converted into a stable with shops outside, consisting of an enclosure with shops outside and a number of huts inside, which were generally occupied by blacksmiths, carpenters and cowherds with their cattle. It was pleaded *inter alia* that the property was an enclosure consisting of shops, etc., and being of the nature of a *katra* or *serai* the custom of pre-emption did not apply thereto. Held plaintiff's claim must be dismissed because he had failed to prove that, by local custom, a right of pre-emption existed on the sale of property, which had not been used as residential premises for several centuries, and which was of the nature of a *serai* or *katra*.

Contrast 2 of 1903 with

(iii). P. R. 108 of 1895.

Plaintiff sued to pre-empt in respect of a sale of a large property called and originally used as a *tawela*, consisting of an extensive plot of land and enclosed by walls and buildings on 4 sides with an open space in the middle, now lying vacant except for a few temporary squatters, and at one time used as stables.

Held, the property in suit having originally been built and used as a *tawela* the right of pre-emption, which admittedly prevailed as to houses in the *mohalla*, presumably attached to it, and in the absence of proof of structural alterations to change it into a *katra* or a *sarai* and of prolonged unmistakable user of it as such.

In order to entitle a particular property to be treated as a *katra* or *sarai* it must be unmistakably shown to be built and used as such.

(iv). I. P. W. R. 46.

The underlying idea of a *katra* is an enclosure with one central yard and shops or places of business on all 4 sides.

(v). P. R. 111 of 1906.

A large enclosure containing 12 shops, other buildings, residential quarters, and a cotton press treated as a *katra*.

We thus see that though P. R. 64 of 1887 and I. P. W. R. 46 attempt a restrictive definition of the term *katra*, P. R. 2 of 1903 and P. R. 111 of 1906 take a much wider view, and we also find

that P. R. 2 of 1903 and P. R. 108 of 1895, which deal with properties difficult to differentiate in origin and present condition, regard the properties variously.

21. Land or Property owned or held jointly.

(a). The words in the present Act take the place of the words "joint undivided immoveable property" in section 12, Punjab Laws Act, and have the same meaning.

In Act II of 1905 the words were "land or property held jointly," which in the Act of 1913 have been amplified to read "land or property owned or held jointly," presumably because it might occur that an owner being out of possession could not be said to hold the property. The amendment merely removes a possible ambiguity.

No definition is given in the Act, but the simplest working definition is:—

"Immoveable property held by two or more persons throughout the whole of which each owner has rights of property and in which no one of the co-owners can postulate that any particular defined area is his exclusively."

That definition is, I think, sufficient for all practical purposes. Where once anyone of the co-owners can state that any particular portion is his exclusively such property ceases to be held jointly.

The definition follows that given in

P. R. 87 of 1894, F. B.

In the case of joint immoveable property the fact that portions of its area are separately cultivated by the persons recorded as having specified interests therein, indicates no more than the fractional share to which such persons would become entitled to on a partition being made, either by a definite separation in interest by agreement among the co-sharers or by a division of the area itself. Until the group of co-owners is thus separated the thing which is the subject of their co-ownership is joint undivided immoveable property under section 12 (a) Punjab Laws Act, whether it be an entire village or portion of a village or house.

That is to say, that property held jointly does not cease to be so merely by reason of temporary separate possession for the purposes of temporary enjoyment. There must be a complete severance of interests or, in other words, one of the original co-owners must be in a position to postulate that the portion he is in possession of is his own exclusive property.

(b). The following points require notice.

(1). Land continues to be joint until partition, but when once partitioned the fact that it was formerly joint will not make it continue to be joint.

(i). P. R. 64 of 1886.

The defendant cannot claim an equal right because he has purchased land in a different holding merely because it was, before partition, included in the same common land.

(ii). C. A. 2671 of 1886.

It is a plain contradiction in terms to say that a person continues to be a co-sharer in a joint holding after that property has undergone a process of complete separation.

(iii). N.W.P.H.C.R. 1861, p. 506, N.W.P.H.C.R. 1867, p. 252, N.W.P. H.C.R. 1865, p. 173, N.W.P.H.C.R. 1875, p. 38.

An essential condition of the existence of a right of pre-emption is that the parties claiming such right shall be co-parceners in the same estate as those against whom the claim is made, a relation which is extinguished by the very operation of partition.

(iv). VII All. 720.

Where in a *mahal* consisting of several *pattis* or *thoks* the *Wajib-ul-arz* gave the right of pre-emption to owners in each *thok* in respect to property in every other *thok* when sold to a stranger, and the said *mahal* was subsequently partitioned, and one of the *pattis* was constituted a separate *mahal*, a new *Wajib-ul-arz* being framed, and a proprietor of land, both in the *pattis* which remained in the original *mahal* and in the *patti* which formed the new *mahal*, sold property in both to a stranger, and a co-sharer in the original *mahal* brought a suit for pre-emption in respect of the property situate therein which had been sold, excluding the property situate in the new *mahal*, held, that the effect of partition was to exclude property situate in the new *mahal* from the operation of the original *Wajib-ul-arz*, that the plaintiff could after the separation exercise no such right against or in respect of share-holders and property so separated, nor could the separate share-holders exercise any right of pre-emption against the plaintiffs and his property remaining in the *mahal* from which they separated.

(v). XXII All. 1.

After partition of a *mahal* into 2 *mahals* no right of pre-emption survives to a proprietor in one *mahal* in respect to land in the other.

(vi). XXXII All. 63 —As XXII All. 1.

(vii). XXXII All. 261.—As XXII All. 1.

(viii). XXXIII All. 605. Ditto.

Contra, however, on the construction of the particular *Wajib-ul-arz* which retained the right of pre-emption:—

W. N. 1892, p. 109, XXVII All. 602, XXVIII All. 286, XXVIII All. 614 and XXXII All. 265.

(2). Property in the course of partition is still joint property until the partition is completed.

XXXV Cal. 575.

While an estate is under partition it cannot be held that partition has been effected so as to destroy the right of a co-sharer to pre-empt.

(3). Partition, however, need not be by metes and bounds to render it an effective partition.

XIV Cal. 761.

A and B had certain proprietary rights in an 8 anna *patti* of a certain *mahal*. C and D had no right in the *patti*, but D had a small share in the remaining 8 anna *patti*.

A private partition between the parties having taken place, C and D's brothers lent B money on the security of *baibilwafa* deeds.

C and D subsequently foreclosed and were put in possession of B's share in the first mentioned *patti* by execution, and thereupon A sued to pre-empt.

Held, though the co-parcenary could not be said to have ceased to exist or those who were co-parceners be said to have become strangers to one another, yet there being a finding that the *pattis* had become separate, it was not necessary, in order to establish A's preferential right, that a partition by metes and bounds should be shown to have taken place, but that a private partition, if full and final, between the parties would have the same effect as the most formal partition on the right of pre-emption, and A's claim must therefore succeed.

(4). The partition may be a private partition.

(i) XIV Cal. 761 *supra* (3).

(ii). 2 W. R. 47.

A private partition, though not sanctioned by official authority, if full and final as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption.

(5). Formal preparation of a deed of partition is not necessary to complete the partition.

P. R. 13 of 1893.

Where an order by a Revenue Court is made, after making a territorial division, that the usual partition deed be prepared and executed by the parties, and where such is not actually done, but the *jamabandis* of a later date show the property as a separate holding and not as part of a joint holding and the plaintiff himself has in his suit described it as a separate holding, held that the partition is complete.

(6). Where partition has been effected as far as possible the mere retention in common of an appendage will not keep the land still joint.

(i). P. R. 131 of 1892.

The fact that property sold was formerly part of a joint estate with the pre-emptor's property gives no preference if it has been divided as far as possible, even if there is a joint portion which is a mere appendage to that held separately and cannot be separated from it.

(ii). P. R. 44 of 1900.

Where land has been divided as far as possible, the remaining joint portion is a mere appendage or adjunct, which does not come under the description of joint immoveable property under section 12, Punjab Laws Act.

(iii). VI B. L. R. 41, F. B. ; XV All. 104.

Where an estate, originally one, has been divided into two separate *mahals* no right of pre-emption survives in an owner in one in respect of property in another merely by reason of certain appurtenances of the original estate being still enjoyed in common by the owners of the separated *mahals*, the appurtenances in the case being a common burying ground and a *chaupal*.

(iv). XVII All. 226.

Where one *mahal* is divided into two, the mere retention of community of interest in certain property such as roads, etc., will not give the sharers in one *mahal* any right of pre-emption over land in another.

(v). XXXIII All. 28.

Where a *mahal* has been perfectly partitioned the fact that a village *chaupal* has remained undivided will not give the owner of either of the new *mahals* a right of pre-emption against the owner of the other.

See, however, P. R. 30 of 1887 which apparently takes it for granted that a person is a co-sharer in land attached to a well if he be a co-sharer in the well.

22. Landowner.

a. The term "landowner," whether in a *patti* or estate, includes :—

(1). Malik Kabza.

P. R. 14 of 1882, 13 of 1885, XVI All. 412 F. B ; XXVIII All 124.

(2). Malik zar Kharid.

P. R. 4 of 1869, 76 of 1880, 189 of 1883, 89 of 1900.

See also "Co-sharer." P. R. 42 of 1880, 87 of 1894 and 16 of 1881.

(3). Owner of a site in the *abadi*.

P. R. 51 of 1907.

Contra :—

P. R. 153 of 1888, P. R. 85 of 1893, P. W. R. 78 of 1908.

(4) Male or female limited interest holders.

26 P. W. R. of 1909.

(5). A widow or other female holding a life interest, and not merely in lieu of maintenance.

P. R. 6 of 1883, P. R. 87 of 1896, 26 P. W. R. of 1909, I All. 452, XI All. 41 and XX All. 148.

(6). A conditional vendor until foreclosure.

XIV All. 195,

(7). A conditional vendee on foreclosure.

VII All. 478.

The two joint owners of a share in a village jointly executed two *bai-bil-wafa* deeds each for $\frac{1}{2}$ of the share in favour of R and A, co-sharers in the village.

In 1875 R's conditional sale became absolute and he was recorded as owner of $\frac{1}{2}$ the vendor's share and got possession.

In 1882 A foreclosed his mortgage and got possession of the other $\frac{1}{2}$ and R then sued to pre-empt. Held, as from 1875 to 1882 R was with the mortgagors a co-sharer in the share, he was entitled to succeed.

(8). A mortgagor out of possession.

XIV All 195, XX All. 19.

(9). A purchaser who has agreed to reconvey to the vendor.

V All. 324 F. B.

Where A conveyed his share in a village by absolute sale to B, and thereafter B agreed to retransfer the share to A at any time in 13 years, if A desired, at the same price, held B, as owner, was competent to sue for pre-emption in respect of other property sold to A during such term, if A did not avail himself of his right to claim retransfer.

(10.) A *Chakdar*.

P. R. 44 of 1870.

(11). An *adna malik*.

11 of 1877.

An *adna malik* having no status as a member of the proprietary body of the village, but owning land in the same *patti* as that in which the land sold was situate, held to have a superior right to a member of the proprietary body who received 5 per cent *malikana*, inasmuch as he was a landowner in the same sub-division.

(12). The owner of a resumed *moafi*.

XXX All. 329.

(13). An owner out of possession.

X All. 472.

The fact that the plaintiff was out of possession of her share at the time she instituted her suit was immaterial. The Court should have ascertained whether she was at the date of the suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

(14). A purchaser whose purchase has not been mutated.

XVI All. 412.

(15). Every proprietor liable for land revenue.

XXVI All. 574 P. C. ; XXXIX Cal. 915 P. C.

(16). A minor proprietor who has not himself, or through his guardian, attested the *Wajib-ul-arz*.

III All. 437.

(17). A co-sharer in a *zamindari* village which contains a resumed *moafi* plot is a landowner in such resumed *moafi*.

W. N. 1881, All. p. 165.

(18). The owner of property giving a right to pre-emption when the owner's interest is limited to the life of another person.

P. R. 99 of 1910.

b. The term "landowner" however does not include—

(1). A widow or other female holding land in lieu of maintenance or dower.

W. N. 1887 p. 93, W. N. 1895, pp. 84, 85, VI All. 17, VIII All. 860, XIX All. 324, XIX All. 327, XIX All. 329.

(2). A mortgagee in possession.

XX All. 19, XXV All. 421.

Contra :—

W. N. 1881, p. 84, overruled by XX All. 19.

(3). A person whose rights are in expectancy.

X All. 472.

The pre-emptor should have vested ownership, and not a mere expectancy of inheritance, or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership.

(4). Owner of waste land in the village.

(i). P. R. 96 of 1898.

Plaintiff, one of the old proprietary body with a large holding, claimed possession by pre-emption of certain land which had been sold by M. to D. by registered deed. Defendant admitted plaintiff's right but pleaded his rights were equal as an owner of land in the same *taraf* as the land in suit. Defendant owned 1 *kanal*, 1½ *marla gair-mumkin chappar* (pond) which he had bought for Rs. 200.

Held, defendant was not a landowner or landholder under section 12 (d) so as to have equal rights with the plaintiff.

(ii). C. A. 377 of 1902.

The owner of a small bit of *gair-mumkin* unassessed land in the *abadi*, at one time agricultural and assessed with revenue of 9 pies, purchased after it has been built on, is not a landowner.

Cf. P. R. 48 of 1899.

Contra :—

7 of 1896.

Plaintiff, who was the proprietor of certain waste land in the village, held under section 12 (c), to have a right of pre-emption against the vendee, who was an entire stranger without any interest in the village, even though plaintiff's land was unfit for cultivation and was not even assessed to revenue.

(5). A *moafidar* squatter in Jahannuma (Delhi).

P. R. 103 of 1889.

The fact that plaintiff occupies as *moafidar* ground under five shops in Jahannuma does not make him a landholder; there the legal owner is Government.

(6). A married woman holding by gift.

C. A. 925 of 1897.

A married Arian woman of Lahore, holding land by virtue of a gift from her father, cannot exercise the rights of an ordinary full proprietor so as to claim a right of pre-emption.

(7). A co-sharer in *shamilat deh* is not, *ipso facto*, a land-owner in the *pattis* of a village.

P. R. 169 of 1889, W. N. 1894, p. 193, II All. 631 and V All. 158 P. C. (Appeal from II All. 631).

(8). A secret *benami* purchaser as against another landowner.

(This ruling should be strictly limited to the circumstances and should not be held to mean that all *benami* purchasers are not landowners in comparison with strangers).

IX All. 480.

A secret purchaser, *benami* in the name of another person, of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption, either under Mohammedan Law or the *Wajib-ul-arz* so as to enable him upon the strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice, direct or constructive, of his title, and asserted immediately upon his purchase of a share for the first time in his true character.

(9). The owner of a grove in a village.

XXVIII All. 246.

A person who buys a plot of grove land in a village does not thereby become a co-sharer in the village so as to entitle him to enforce a right of pre-emption under a *Wajib-ul-arz*, which confers such right upon co-sharers.

(I doubt the correctness of this ruling so far as the Punjab is concerned).

(10). An occupancy tenant.

(11). A *mugarridar*.—See Superior and Inferior Proprietors.

(12). A person who may be entitled to property on the death of another, that other not being owner.

P. R. 99 of 1910.

23. Lineal descendants of the vendor.

This term means all persons who are related to the vendor as sons or daughters, grandsons or grand-daughters, great-grandsons and great-grand-daughters, and so on.

Females were, under Act II of 1905, excluded in section 12, but have now, under section 15 (b), a right to come in equally with males, if entitled to succeed. Persons related through an ascendant are not included in the term.

I take it that the term has the same meaning as in section 59 of the Tenancy Act, and therefore an appointed heir would have no status

under this clause, nor would the heirs of such an appointed person, though of course the appointed heir's lineal descendants would have a right if the sale was made by the appointed heir.

24. Local Authority.

Has the meaning assigned to the term in Punjab General Clauses Act I of 1898, section 2 (30), *viz.*

"A Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund."

25. Notification :—

Under section 3 (6), Punjab Pre-emption Act, the expression "notification" has the meaning assigned to it in the Land Revenue Act, 1887, which in section 3 (15) defines the term as :—

"A notification published by authority of the Local Government in the official Gazette".

26. Occupancy Rights.

The "rights of occupancy" are those created under section 5 *et seq* of the Panjab Tenancy Act.

Occupancy Rights are of three kinds :—

Those created under section 5, Tenancy Act.

Those created under section 6, Tenancy Act.

Those created under section 8, Tenancy Act.

27. Order of Succession.

(a). These words take the place of the older words "order of relationship" in section 12 (b), Punjab Laws Act.

Under the old law the terms used lent themselves to a certain ambiguity, which was not finally set at rest until P. R. 74 of 1906, F. B. was published, but the present words leave no room for doubt.

(b). "Order of succession" means simply the order in which persons *inter se* would be entitled to inherit. Consequently the old learning regarding proximity of relationship has no place under the present law.

Representation, therefore, has to be considered, and the proximity of the line, not of the individual has to be looked to. Thus a brother's son and brother's grandson are on the same footing and both are nearer in succession than an uncle's son.

Of course the "order of succession" has to be determined with reference to the customary or personal law of the parties, and when that has been determined, the person first entitled to succeed, in case of succession, is the person first entitled to pre-empt. If the nearest in succession does not seek to pre-empt then the person next in the succession may do so, and so on till all the heirs in succession are exhausted.

No doubt difficult cases are bound to arise and in addition to complicated questions as to the law of pre-emption, in some cases difficult questions of inheritance will also arise.

(c). The following rulings which held that the words "order of relationship" in the Punjab Laws Act meant proximity of the individual and not of the line, and which would therefore give preference to a brother's son as against another brother's grandson, are now merely of academical interest.

P. R. 65 of 1878, 117 of 1882, 58 of 1885, 126 of 1890, 28 of 1899.

(d). The ruling on which the present term is based is,

P. R. 74 of 1906, F. B.

The expression "in the order of relationship" in section 12 (b), Punjab Laws Act, has no reference to degrees of propinquity, but is equivalent to "order of succession" in cases of landed property under the Customary Law of the Punjab.

In the particular case the plaintiff was 4 degrees removed from the vendor, the vendee 6 degrees but their rights of succession were identical. Held, they had equal rights to pre-empt.

(e). Of course where there are rival pre-emptors, each, by virtue of being in the line of succession, entitled to pre-empt as against the vendor and vendee, their rights *inter se* are to be determined by reference to the position they hold in the order of succession.

P. R. 21 of 1908.

The rights of heirs *inter se* will be determined by the order of succession, that is, the nearer heir would exclude the more remote.

(f). But every person in the line of succession has an independent right of pre-emption, so a son is not prevented from suing merely because his father fails to do so or is estopped.

See P. R. 7 of 1912, P. W. R. 182 of 1911, P. W. R. 54 of 1912.

28. Patti.—See Sub-division of an estate.

29. Pre-emptor :—

(a). The term "pre-emptor" means any person who possesses the statutory qualifications given in the Act entitling him to purchase property liable to pre-emption in preference to any other person, and includes—

(1). Corporations, such as mosques, *dharmshalas*, etc.

(i) P. R. 153 of 1884, 100 of 1885.

(ii). XXVI All. 212.

The manager of a Hindu temple, who, as such manager holds *zamindari* property on behalf of the temple, has the same rights of pre-emption as any other *zamindar* in the village may possess.

(This latter ruling, so far as the Punjab is concerned, depends on whether the necessary statutory qualifications are possessed by the institution).

(2). A manager of a Court of Wards on behalf of his ward.

XXXIX Cal. 915 P. C.

Under his ordinary powers as an agent, the manager, under the Court of Wards Act, has the power to claim pre-emption for the ward, irrespective of whether the Court of Wards Act gives him any power or not;

but it does not include—

1. One out of two or more joint owners who has been a party to the sale.

Section 10, Pre-emption Act.

(b). In sections 11 and 14, Pre-emption Act, II of 1905, and section 17, Act of 1913, the word has a limited meaning and is confined to such person or persons as are before the Court as plaintiffs claiming pre-emption, and does not include a vendee or one who has no preferential right as against the vendee.

(i). P. R. 83 of 1907.

Section 14 deals with several pre-emptors claiming in respect of the same property, but does not provide for the case of a pre-emptor claiming against a vendee who has equal rights with him.

(ii). P. R. 17 of 1908.

The word “pre-emptors” in section 14 does not include vendees but only persons other than vendees who are claiming pre-emption.

It seems to me reasonable to hold, too, that section 11 applies only to a person claiming pre-emption.

(iii). P. R. 21 of 1908.

Where a pre-emptor has equal rights with a vendee he cannot avail himself of the provisions of section 14.

Section 14 applies to cases where several pre-emptors are equally entitled against the vendee, it does not refer to the case of a claimant who has no preferential right as against the vendee.

But *Contra*.

P. R. 87 of 1911.

Where the pre-emptor and the vendee have equal rights of pre-emption, the pre-emptor is entitled to one half of the property sold and the vendee to the other half.

Nor does it include a person, with equal or superior rights to the plaintiff, who has effectively exerted his pre-emptive right *ante litem* or *pendente lite* by sale.

P. R. 53 of 1911

Section 14 has no application to such a case and consequently plaintiff is not entitled to share the property in suit with a transferee as a rival pre-emptor with equal rights of pre-emption.

30. Revenue Officer.

(a). Under section 3 (6), Punjab Pre-emption Act, the expression Revenue Officer has the meaning assigned to it in the Land Revenue Act, 1887, which in section 3 (12) defines the term as—

“A Revenue Officer having authority under this Act to discharge the functions of a Revenue Officer under that provision.”

b. The Revenue Officers established by the Land Revenue Act are given in section 6 of the Land Revenue Act—

- (a) The Financial Commissioner;
- (b) The Commissioner;
- (c) The Collector;
- (d) The Assistant Collector of the first grade, and
- (e) The Assistant Collector of the second grade.

The Deputy Commissioner of a district shall be the Collector thereof.

The Local Government may appoint any Assistant Commissioner, Extra Assistant Commissioner or Tahsildar to be Assistant Collector of the first or of the second grade, as it thinks fit, and any Naib Tahsildar to be an Assistant Collector of the second grade.

(Note.—

Vide Punjab Government Notification No. 731, dated 1st November 1887, whereby all Assistant Commissioners and Extra Assistant Commissioners, who have not been invested with the powers of an Assistant Collector of the 1st grade, have been appointed Assistant Collectors of the second grade, and *vide* also Punjab Government Notification No. 730 of the same date, whereby all Tahsildars and Naib Tahsildars have been appointed Assistant Collectors of the second grade.

Vide also Punjab Government Notification No. 684, dated 18th September 1893, whereby all Assistant Commissioners and Extra Assistant Commissioners, who have been invested with the powers of a Magistrate, 1st class, or 2nd class, under the Criminal Procedure Code, and also with the powers of a Munsiff of the 1st or 2nd class under the Punjab Courts Act, are appointed as Assistant Collectors of the 1st grade.)

31. Sale.

(a). No definition of the word “sale” is given in the Act.

Section 3 (5) excludes from the category of sales to which the right of pre-emption extends, sales in execution of a decree for money or order of a Civil, Criminal or Revenue Court or of a Revenue Officer; section 8 (2), sales or classes of sales exempted by notification; and section 9 sales by or to Government or to any local authority or to a Company under Act I of 1894, and sales sanctioned by the Deputy Commissioner under Act XIII of 1900.

(b). According to Muhammadan Law “sale” is “an exchange of property for property by consent of parties.”

V All. 65.

Under the Muhammadan Law, sale is defined to be the exchange of property for property by consent of parties, each property being regarded as the price of the other.

"Price," as a term of Mohammedan Law, includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration not capable of being estimated at a definite money value, such transfer is not regarded as a sale at all and does not give rise to the right of pre-emption. Since the payment of the price by the pre-emptor is an essential condition precedent to his acquiring the property by virtue of his pre-emptive right, it follows *ex necessitate rei* that the right of pre-emption can operate and be effectually enforced only in those cases in which the consideration for the transfer is either fixed at a definite money value, or is capable of being so ascertained.

This definition is not entirely applicable to the Punjab, as under it a simple exchange, where the valuations were ascertainable, would be a sale.

(c). According to the Indian Contract Act "sale" is defined as the "exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer."

This definition leaves the important point of "price" undefined.

(d). According to the Transfer of Property Act "sale" is defined as "a transfer of ownership in exchange for the price paid or promised, or part paid and part promised."

This definition was accepted in VII All. 482 as a proper definition for the purposes of the Pre-emption Law.

It was also partially adopted in P. R. 157 of 1883.

No better definition of a sale can be suggested than that given in section 54 of the Transfer of Property Act, and though, when the price does not consist entirely of money, the transaction would become an "exchange" as defined in section 118 of that Act, this would not affect the rights and liabilities of the parties to it.

This ruling, therefore, suggests that that definition is too narrow, and this is the latest and best view of the Chief Court.

P. R. 29 of 1893.

The meaning of the word "sale" in section 9, Punjab Laws Act, is not to be interpreted by reference to the definition of sale or affected by the definition of "exchange" in the Transfer of Property Act.

(e). It may be said that a sale under the Pre-emption Act must be—

- (1) A completed transfer.
- (2) A permanent transfer.
- (3) A transfer for a consideration mainly, though not necessarily entirely, in money.
- (4) A valid transfer.
- (5) A transfer of immoveable property.

Authorities re (1)—

VI All. 463.

To entitle a co-sharer to assert a right of pre-emption there must, as a condition precedent to such assertion, be a sale already negotiated with a stranger and a price fixed with the stranger by the co-sharer desiring to sell.

Authorities re (2) and (3)—

(i). P. R. 29 of 1893.

The characteristics of "sale" are :—

(a) that it is a permanent transfer, which, therefore, distinguishes it from mortgages other than *bai-bil-wafas* and leases;

(b) that it is for consideration, which distinguishes it from gifts.

There is nothing in the Punjab Laws Act to restrict "sale" to permanent transfers for money alone.

(ii). P. R. 45 of 1895.

The essence of a sale is that an owner of property parts with it permanently for a consideration. The essence of a mortgage is that the owner merely pledges it as security for a loan which he intends, if possible, to repay.

(iii). P. R. 136 of 1907.

It is clear that a sale involves the transfer of ownership. A transaction by which ownership is not transferred, but is expressly reserved, can in no sense whatever be held to be a sale.

Authorities re (4)—

(i). VII All. 482.

Mahmud, J. :—

A valid and perfected sale is a condition precedent to the exercise of the pre-emptive right; and in the present case the provisions of section 54, Transfer of Property Act, prevented the transaction from taking effect as a sale or passing the ownership from the vendor to the vendee.

(ii). XXII All. 343.

No right of pre-emption arises upon a sale, which, according to Muhammadan Law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold, but if such sale becomes complete, a right of pre-emption arises.

(iii). XXXII Cal. 988.

No right of pre-emption arises when the sale, upon the contingency of which the right is claimed, is a fictitious transaction arranged so as to cheat the pre-emptor.

The vendee, however, is not entitled to raise invalidity in defence.

IV All. 37.

The vendees in a suit to enforce a right of pre-emption set up as a defence to the suit that the sale was invalid on the ground that they were minors and therefore incompetent to contract. Held, that as they had paid their money to the vendor and the conveyance had been perfected, they were estopped from urging such ground.

The strict interpretation of the rule in VII All. 482 by Mahmud, J., was not assented to by Petheram, C. J., Straight, Oldfield and Brodhurst, JJ., who held :—

The deliberate omission by defendants to observe a necessary legal formality such as registration . . will not make the transfer any the less a sale, and consequently the right to pre-empt exists.

Authority re (5)—

Section 4, Pre-emption Act.

(f). A sale has been held to be complete :—

(1). Without registration or delivery of possession.

(i). P. R. 62 of 1879.

In absence of an intention common to both parties to a sale that the ownership should not pass until the deed of sale had been registered and delivered to the vendee or until possession has been given, the accomplishment of these conditions is not essential to the completion of the sale.

(ii). P. R. 43 of 1900.

Possession of the land not being with the vendors at the time of the sale, and consequently not being given to the vendees, did not prevent the sale from being complete.

(2). When and not before a cessation of the vendor's interest occurs.

XXXV Cal. 575.

Before a sale can be complete there must be a cessation of the vendor's right in the property, and the solution as to whether there has been such a cessation is to be found in determining in each case what was the intention of the parties.

(3). It is not complete where property belongs to several persons until it is made by and with the authority of all of them.—P. W. R. 6 of 1911.

(g). The following permanent transfers of interests have accordingly been held to be sales :—

(1). Creation of *Adhlapi* Tenure.

Note.—

This form of tenure exists mainly in the Multan and adjoining districts. The customary mode is for the landowner to convey to the tenant full rights in a portion of the holding in consideration of the making or restoration of a well to irrigate the whole holding.

(i). P. R. 157 of 1883.

(ii). C. A. 1130 of 1882.

The right was, however, disallowed under the old law in C. A. 885 of 1903, because custom did not allow it in the Lodhran and Shujabad Tahsils. In view, also, of section 3 (5) (c), Pre-emption Act, P. R. 136 of 1907,

(*vide* p. 93), it is doubtful if the creation, as distinct from the sale of an existing *adhlapī* tenure, is a sale.

(2). Sale with subsequent contract to resell.

(i). V All. 324 F. B.

Where A. sold to B. certain property and four months later B. agreed to retransfer to A. at the same price in 13 years if A. desired, and A. had not availed himself of the subsequent agreement; held, the transaction was an out and out sale, and not a mortgage by way of conditional sale.

(ii). XVII All. 451.

On 6th June 1887, R. K. sold certain property to S. On 18th May 1888 B. brought a suit for pre-emption. Pending the suit, on 6th July 1888, the vendor, vendee and pre-emptor entered into an agreement by which the vendee, recognizing the plaintiff's pre-emptive right, agreed to retransfer the property to the vendor or the pre-emptor, on payment by either of them on the full moon in *Jeth* in any year of the price paid by him. On 20th June 1891, the vendor, affecting to treat the transaction of 6th June 1887 as a mortgage, prayed for redemption. The vendee resisted, and on 13th November 1891 R. K. applied for repayment of the deposited redemption money, stating he wished the vendee to remain in possession and asking that the agreement of 6th July 1888 might be considered null and void.

On 1st September 1892 R. S. sued to pre-empt.

Held, that the original transaction of 6th June 1887 was an out and out sale and was not and could not be, by the subsequent agreement between the parties, turned into a mortgage by way of conditional sale.

(iii). XXXIII All. 585.

Where an out and out sale-deed was executed and seven days later the vendee covenanted to reconvey the property sold if the vendors paid back the purchase-money in nine or ten years from the date of sale-deed, held, the two deeds could not be considered to be parts of one transaction constituting a mortgage by conditional sale, but must be construed separately, and to be merely what they purported to be.

(3). Sale subsequently modified.

P. R. 43 of 1900.

On 13th September 1892 J. and H. sold to one M. a four-sixths share in certain land, for which they had sued a third person, possession to be given on obtaining a decree. On 10th October 1895 M. sold his rights to N. N. sued J. and H. for possession on 7th December 1895, and on 4th January 1896 a compromise was effected, J. and H. agreeing to hand over three-sixths of the land, a decree being passed to that effect. On 26th January 1897 A. sued to pre-empt the amount of land mentioned in the compromise.

Held, the transaction of 13th September 1892 was an out and out sale, and there was no novation of contract by the compromise.

(4). Conveyance in return for recovering a right to land.

(i). P. R. 54 of 1889.

B. made an agreement with A. promising him that if he, A., brought a suit for him (B.) to recover land and was successful, B. would give him half in consideration of his trouble and expense and on success of the case B. did convey half to A.

Held, on a suit by C. to pre-empt, that the transaction was a sale and afforded a basis for a suit for pre-emption.

(ii). C. A. 1366 of 1907.

Where in consideration of receiving money to prosecute a suit for the recovery of land, it was promised that on obtaining possession the property would be delivered to the advancer, held, the agreement was a sale and not a contract of sale.

(iii). VII All. 291.

On 1st September 1881, L. and R. agreed by registered instrument with B. that, in consideration of their bringing a suit to recover a 12-annas share in a village, which B. claimed by right of inheritance against G., they should receive a moiety of the share. L. and R. found the necessary funds for prosecution of two suits in respect of the share and on 5th April 1882, on compromise, B. got $1\frac{1}{4}$ annas out of the 12 annas claimed, and in the compromise B. stated as follows:—"I make over 1 anna to L. and R., my partners, in lieu of the prosecution of the two cases, the plaintiff to remain in possession of the remaining 3 pies.

Held, in a suit to pre-empt on the transaction of 5th April 1882, that the compromise was only a re-adjustment of the interest in the share between B., L. and R. and that the real transfer to L. and R. was given effect to on 1st September 1881.

(5). Co-incident mortgage and purchase of equity of redemption where the interests have not been expressly kept separate.

P. R. 98 of 1906.

The facts were that on 19th February 1903 a mortgage was made not redeemable for 32 years. On 2nd September 1903 the equity of redemption was sold to the same person. The vendee in his pleas had expressed no intention of keeping the interests separate. Held, the pre-emptor could pre-empt both. As a pre-emptor by reason of his pre-emptive right is entitled, not merely to have the sale transferred to him, but also to be vested with all the benefits which legally flow from the sale, held, the purchaser of an equity of redemption, who already held possession of the property in dispute under an unexpired mortgage could not, in the absence of clear proof of an express indication of an intention to preserve the charge on his own estate, set up against the pre-emptor his own previous mortgage as still subsisting.

(6). Sale of pre-empted property by a successful pre-emptor before he obtains possession.

VII All. 107.

The holder of a decree for pre-emption, who afterwards sells the property to a stranger and permits the latter to pay the money into Court, does not debar himself from obtaining possession of the property in execution. Where the pre-emptive property and not the decree is transferred, the effect of execution is merely to put the pre-emptor in possession, and the sale-deed would give rise to a separate cause of action for other pre-emptors, therefore, in the present case, the sale-deed must remain in abeyance till the pre-emptor gets possession and the case is analogous to one in which the pre-emptor, immediately on getting possession under the decree, sells the property.

(7). An assignment for money, past services and favours.

P. R. 2 of 1903.

An assignment in consideration of money, favour and past services is a sale.

P. R. 23 of 1906.

An assignment of immoveable property by a maternal uncle to his sister's son for money paid and to be paid by the transferee for the transferor plus past services and natural love and affection is a sale.

(h). In the following cases transactions have been held not to be sales:—

(1). Pre-emption decrees.

(i). P. R. 42 of 1873.

No fresh right of pre-emption arises on the making of a decree in a pre-emption suit, the defendant selling under the order of the Court being under no obligation to offer to any one else.

(ii). P. R. 25 of 1899.

Where A. sold to B., and C. got a pre-emption decree, and then D. sued, impleading both B. and C., held D.'s cause of action was the sale to B., and not the pre-emption decree in favour of C.

(iii). VII All. 917.

An appeal having been preferred from a decree in a suit for pre-emption, the parties to the suit entered into a compromise, whereby the plaintiff pre-emptor relinquished his claim to a part of the property in dispute in favour of the defendants-vendees and the latter admitted his claim with respect to the remainder of the property. Upon this compromise a decree was passed. Subsequently a co-sharer in the village brought a suit for pre-emption upon the contention that the compromise and decree thereon amounted to a transfer to the plaintiff in the former suit. Held, the suit was not maintainable.

(iv). XXV All. 334.

No suit for pre-emption will lie (the basis of which is a decree for pre-emption in another suit) even when the decree is collusive.

(v). Section 3 (5) of the Pre-emption Act.

(Note.—Under the old law in P. R. 8 of 1882 and P. R. 23 of 1882 pre-emption decrees were made the basis of claims, the suits being disposed of on other grounds.)

(vi). XXXII All. 340.

There has not, under the decrees in favour of the rival pre-emptors, been any fresh transfer in their favour.

(vii). P. R. 40 of 1911. *Vide infra* (page 94).

(2). Sale of a pre-emption decree.

(i). VII All. 107.

(ii). C. A. 1399 of 1899.

(iii). P. R. 94 of 1902.

The sale by a successful pre-emptor to his grandson of a pre-emptive decree, in virtue of which the grandson paid in the purchase-money and obtained

possession of the land, is merely a transfer of the right to obtain the property by compliance with the terms of the decree, and is therefore not a sale of immoveable property subject to the right of pre-emption.

Contra :—

78 of 1896,

The transfer of a decree for pre-emption will operate as a fresh sale of the property conferring a fresh cause of action on pre-emptors.

(3). Contracts to sell.

(i). P. R. 65 of 1898.

According to the terms of a certain deed stamped with a Re. 1 stamp, the vendor undertook to satisfy the plaintiff further as to his vendor's title and to execute a deed of sale in three months, after which, if such deed was not executed, he might sue for specific performance. The purchase-money was Rs. 15,000, of which Rs. 4,300 had been paid in cash.

Held, the deed rightly construed amounted merely to a contract to sell, and that the payment of consideration did not necessarily imply the deed was a sale.

(ii), XII All. 234.

An agreement to transfer by sale is a merely executory contract, and does not operate as a sale *in presenti*.

(iii). P. R. 40 of 1911—*vide* (8), p. 94.

(4). Offer to sell.

P. R. 30 of 1897.

An owner gave notice to the pre-emptor of his intention to sell at a certain price. The pre-emptor refused to pay such price, but tendered what he considered a fair price. This tender was rejected by the owner and the pre-emptor instituted a suit to enforce the sale at the market value. Held, the suit would not lie, there having been no completed sale, but merely a proposal to sell which the owner was entitled to revoke at any time before acceptance, and which in the present case had not been accepted before the owner's revocation.

(5). Sale with a coincident contract to re-sell.

III All. 369.

In a suit not for pre-emption, held, that when A. sold property to B. and it was contracted by an instrument executed at the same time that B. should reconvey to A., as the deeds were coincident, the transaction did not amount to a sale.

(6). The creation as distinct from the sale of occupancy rights.

(i). Section 3 (5) (b), Act I of 1913.

(ii). P. R. 136 of 1907.

Section 3 (1) contemplates a right in existence previous to the transfer, and not a right which is created and brought into existence by the transfer itself, i.e. the creation of occupancy rights by way of permanent lease is not a sale, but the sale of occupancy rights is a sale subject to pre-emption.

An agreement by which a landowner created a right of occupancy in another person in consideration of money plus an annual rent and service, *viz.*,

Rs. 2,300 *nazrana*, Rs. 12 rent per annum, ordinary village services and reversion if no issue being expressly stipulated for, is not a sale and cannot, therefore, be a subject of pre-emption.

(iii). XV Cal. 184.

Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants a *maurusi* lease, the doctrine of pre-emption will not apply.

(iv). P. R. 37 of 1911.

The arrangement by which proprietors of certain land granted occupancy rights on payment of a very trifling sum in order to effect improvements is not a sale.

Contra :—

Under Punjab Laws Act.

(i). C. A. 1362 of 1879, P. R. 196 of 1882, P. R. 43 of 1892.

(ii). P. R. 120 of 1883 and P. R. 179 of 1888.

While holding there was no presumption in respect to a sale of non-transferable rights of occupancy, the creation of such rights were treated on the same footing as sales and proof was allowed of special custom extending the right of pre-emption to the creation of such rights.

(7). A compromise recognizing a prior interest and defining that interest.

(i). L. R. I. L. A. 157 (1874).

(ii). XXXIV Bom. 139.

The terms of a compromise affecting a claim to land and reduced to writing, stating that the parties to the deed were co-sharers in certain land, and containing provisions as to future partition of the land, held not to be a sale.

(8). Conveyance by guardian of own land in pursuance of contract that, in case a conveyance by him of his ward's land being objected to, he would convey his own, such contract having been decreed.

P. R. 40 of 1911.

A minor's guardian sold property jointly owned by himself and his ward, covenanting that if the minor objected he would convey other land of his own equal to the minor's share. Subsequently the minor sued and the conveyance of his share was cancelled.

The vendee then sued and got a decree on the covenant and obtained possession of the guardian's land by execution.

The guardian's sons then sued to pre-empt. Held, there was no sale within the meaning of the Pre-emption Act, but merely a decree enforcing a contract to sell and, even if it were a sale, it was a sale effected in execution of decree.

(i). Mortgages, exchanges, leases and gifts, not being permanent alienations for consideration mainly in money, are of course not sales, but ostensible mortgages, exchanges, gifts and leases may be proved to be sales. For principles on which to decide and for instances *vide* Chapter V.

(j). Sale in section 20 (c), Act II of 1905, was equivalent to "decree."

(k). For other properties the sale of which is excluded from pre-emption, see Chapter VI.

82. Sarai.

(a). No definition of the term "sarai" is given in the Act, and the only cases in which property of the nature of a *sarai* has been dealt with by the Chief Court are P. R. 108 of 1895 and P. R. 2 of 1903, which have been already given under the definition "Katra."

Platts defines "sarai" as "house, mansion, palace, temporary home for travellers, caravansaray, inn."

The common form of a sarai is well-known, consisting as it does of a square of buildings with a main entrance, used for temporary resting for travellers.

The term as used in the Punjab generally applies only to buildings fulfilling the secondary meanings given by Platts.

(b). The difficult question that will arise is, whether a *sarai* in the meaning of the Act includes such buildings as a club or a European hotel or, what are growing rapidly in numbers in large cities, so-called native hotels.

It is practically impossible to draw any sharp dividing line between a *sarai* and a native hotel on the one hand and a native hotel and a residential house on the other.

In the absence of some clear definition it is impossible to lay down any general rule for guidance. Each case will have to be judged on its merits, and I take it that the criterion will have to be the main existing use to which the building is put and the object with which it was built.

If its principal use is for the accommodation temporarily of travellers, the establishment being run on commercial lines, then it will be a *sarai*, and in that view a hotel would fall under the definition.

I recognize the difficulty that would arise, say, in the case of a house used as a boarding house, but it is impossible to lay down any guiding principle which will meet all cases.

The difficulty only adds force to what has been said under the definition of "shop," viz., that it would have been far better to restrict the right of pre-emption to private dwelling houses, so far as buildings are concerned in towns, rather than to have excluded particular forms of immoveable property from its operation,

P. R. 108 of 1895 would appear to exclude boarding houses from the operation of the definition.

P. R. 108 of 1895.

Nor does the occupier of a dwelling house by letting the several rooms to different tenants or by putting up travellers necessarily change it into a *sarai*.

And a similar view appears in P. R. 96 of 1910.

The mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance visitors does not necessarily convert what was originally a *tawela* into a *sarai*.

(c). The question as to what is a *sarai* is a question of law.

P. R. 96 of 1910.

The question whether a certain building is or is not, on the facts found by the Lower Appellate Court, a *sarai* is a question of law.

33. Shop.

(a). No definition of the term "shop" has been given in the Act. Under the Punjab Laws Act it was possible to prove the custom extended to shops, but under the present Act they are excluded from pre-emption absolutely, and it is therefore necessary to attempt a definition.

It may be said that a building primarily devoted to retail trade is a shop. Beyond that it is not safe to go at the present time, and in the absence of any authoritative decision it cannot be said that the term includes such structures as warehouses, factories, workshops, etc. If, however, they are not "shops," it is difficult to understand on what principles they may be liable to pre-emption when retail shops are not.

On the other hand, where a property is used partly as a residential house and partly as a shop, it is difficult to lay down any general rule as to how the property is to be treated.

Each such case must be treated on its own merits.

(b). It is possible, however, to lay down the following rules for guidance:—

(1). A building mainly used as a shop cannot be regarded as a house merely by reason of the fact that there is an upper storey used for residential purposes.

(i). P. R. 17 of 1895.

A shop in a bazar cannot be pre-empted as a house merely because there is an upper storey to it which is used as a residence.

Houses which are distinguished from shops are generally understood to be residential houses in which people ordinarily have their permanent abodes and live with their families. *Baithaks* on top of shops, which are mostly tenanted by prostitutes, do not fall within this category, even though the inmates may happen often to cook their food or sleep in them.

If a shop forms part of a dwelling house and is sold with it, it may be that the same rule of pre-emption will govern both, and that the pre-emptor of the house will be found entitled to the whole bargain.

(ii). P. R. 83 of 1901.

A *baithak* on top of two shops does not alter the nature of the property so as to make the same a residential house.

(2). So, too, a residential house is not converted into a shop by the mere fact that business is carried on in it or part of it for a time.

(i). P. R. 108 of 1895.

The occupier of a building used as a dwelling house does not necessarily convert it into a shop or a cluster of shops so as to make the rule of pre-emption inapplicable by carrying on business in it for a time.

(ii). C. A. 1202 of 1906.

A building in which a milkseller lives with his wife and sells milk is a residential house and not a shop, even though most of the buildings around it are shops.

(iii). P. R. 122 of 1906.

The use of residential property as business premises for transacting the business of commission agency does not alter the nature of such property, and it would not, in consequence of such usage, be considered to be shop property.

A shop in the ordinary sense of the word is a building or apartment where goods are sold by retail.

(iv). P. R. 21 of 1907.

The conversion of a part of a residential house into shops, and their use for godowns for a short period, does not change the character of the property as originally built and hitherto used. It is not sufficient to change the character of a building as a residential quarter that for some time past it has been occupied by casual tenants or that portions have been used as godowns by persons who held their business shops elsewhere.

The facts of this case were that the street was a residential quarter, the building was constructed as a house, the ground floor had a *deohri* and a large room recently converted into four shops, used now as godowns. Above was a *dalan*, *kothris* and a *baradari*, and it was described in deeds as a *haveli*. Held, not to be a shop.

(3). Though P. R. 122 of 1906 limits the word shop to retail business premises, warehouses and other commercial buildings have been dealt with as if shops in some cases.

(i). P. R. 70 of 1898.

Buildings erected on a site in a new *abadi* outside the town, formed for the purpose of starting workshops for the manufacture of *belnas*, are not dwelling-houses but business premises—i. e., in fact shops.

(ii). P. R. 111 of 1906.

The property in dispute was a block of 12 shops and other buildings including a cotton press, part being used as a residence. It was all dealt with as a shop.

(iii). P. R. 113 of 1906.

Was a case where warehouses attached to shops were dealt with as if they were shops.

(4). Where there are large commercial buildings, the fact that a part is used as residential quarters will not make the block a house.

P. R. 111 of 1906.

The property contained 12 shops, a cotton press and residential quarters. Held, the latter fact did not alter the nature of the property.

The authorities given above are somewhat difficult to reconcile. If the definition given in P. R. 122 of 1906 is to be taken as conclusive, then warehouses, workshops, wholesale emporiums, business offices, factories, etc., are all liable to pre-emption, while a *halwai's* shop is not.

It appears to me that the matter has been approached from the wrong point of view altogether. Pre-emption in towns is by no means universal, and under the old law it had to be proved not merely as existing in a particular locality but as extending to property of the nature in suit.

Further the idea of pre-emption in towns is mainly to preserve the integrity of a residential quarter.

Accordingly it seems to me that instead of stating that the custom shall not attach to particular kinds of property in towns, it would have been more consonant with the old ideas of the law and with the origin of the custom to have expressly limited the application of the custom to definite classes of property, *viz.*, private residential property, which it would not be difficult to define, excluding thereby all properties which did not fall within such definition.

84. Specification of Interests.

(a). The term "specification of shares" does not occur in the Pre-emption Act, but it is one well known in the Law of Pre-emption, and arises in connection with two matters dealt with by that law.

It will be seen in the Chapter on the Nature of the Pre-emption Act that the doctrine that a pre-emptor must take over the whole bargain is inapplicable to a case where a person having a right of pre-emption joins with a stranger in purchasing, if the transaction be not a joint and indivisible one, that is, if there be a specification of interests of the vendees. It will also be seen that the rule to the effect that a co-sharer joining with a stranger in a purchase forfeits his right as against an equal or inferior pre-emptor if the sale he has participated in is joint and indivisible, but not if it be divisible, that is, if there be a specification of interests.

It is therefore necessary to note what the Courts have held to be deeds containing a specification of interests.

It will be found that there is a certain amount of divergence in opinion on the various points, but I have followed the Punjab rulings where they are in conflict with those of other Courts,

(b). The following principles are deducible from the rulings:—

(1). A specification of the shares taken by each party to the contract and of the proportion of the purchase-money paid by each is a specification of interests making the sale a divisible one.

(i). P. R. 6 of 1909.

B. and C. bought certain lands in the proportion of two-thirds and one-third, the price paid by them being fully specified in the deed of sale. Held, that as the price and shares were distinctly specified, the sale was a divisible one.

(ii). VIII All. 462.

In this case three co-sharers and one stranger joined in the purchase. The four shares were separately specified fractionally, and the share of the purchase-money paid by each separate vendee was also separately specified, and the Court held that there was specification.

(2). The specification of the fractional shares taken by each of the purchasers will not make the transaction a divisible one, if the proportionate price paid by each is also not specified.

(i). P. R. 94 of 1895.

Where the sale was of an undivided share in a village in which the only specification between the co-sharer vendee and the stranger vendee was as to the proportions in which the several vendees should be regarded as joint owners, the sale held to be not one in which separate parcels of land were sold to distinct vendees but a joint purchase with specifications of shares only.

(Note.—This case appears to be one where the sale-deed specified the detail of the sum paid by each vendee and the fractional share in the land to be taken by each, and accordingly would seem to be an authority opposed to the principle mentioned in (1) *supra*.)

(ii). P. R. 66 of 1896.

One R. sold certain land to three brothers for a lump sum of Rs. 2000, but the deed of sale recited that two-thirds of the property was sold to two of the brothers and one-third to the other.

Held, the contract of sale as regards the vendor was one and indivisible, the specification of the shares in the sale-deed being merely an arrangement among the purchasers *inter se*, which did not affect the vendor who had contracted to take Rs. 2,000 for the whole land and could not in a suit for specific performance have been compelled to sell to one or the other of the vendors his specified share on payment of a proportionate share of the purchase-money.

(iii). P. R. 48 of 1907.

A sale for a total sum to three sets of vendees, who were stated to be purchasers in particular fractional shares, held to be joint and indivisible, as there was no specification of plots or proportion of price payable by each.

(iv). P. W. R. 276 of 1912.

In order that a sale may be considered as divisible the mere specification in the sale-deed of the shares of each vendee in the property sold is not sufficient, without distinct specification of the proportions of the purchase-money, and a vendee who claims the sale is divisible must show that, as a matter of fact, his purchase was a distinct and separate purchase.

(v). IV All. 252.

A co-sharer of an estate sold his share to R., also a co-sharer, and C. and D. strangers, selling it to all of them jointly and collectively for one integral sum as a consideration for the whole. The sale-deed specified that each purchaser took one-third share in the property sold.

Held, such specification could not alter the joint nature of the sale transaction or permit of its being broken up and treated as involving 3 separate contracts, so as to enable R. as a co-sharer with equal right of pre-emption to resist, so far as one-third of the property was concerned, a claim by another co-sharer to pre-empt in respect of such sale.

Straight, J.—The contract of sale was a joint and indivisible one and the consideration joint. The mere mention of the proportion in which the vendees were to take the property cannot alter the nature of the transaction, nor permit of its being broken up and treated as involving 3 separate contracts.

(vi). VII All. 118.

Where there were five vendees, one a stranger and 4 co-sharers, each taking an equal share, there being only a recital of the total sum paid, the sale was treated as a joint and indivisible transaction.

(vii). XV Cal. 224.

Held, that in the case of a joint purchase made by 2 persons of shares in 2 villages, in one of which one of the purchasers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares (two-thirds and one-third) in the aggregate purchase would not affect the rule that the sale was joint and indivisible.

Contra.—

XIX All. 148.

Where in cases of this kind the sale deed specifies the interest or share purchased, so that it shows what was the particular property purchased by each of the vendees, whether by definition or plot, the vendee co-sharer cannot be disturbed, and it is immaterial whether the proportion of the purchase-money found or to be found by each of the vendees is or is not specified in the sale-deed. Where the share of each vendee in the property sold is specified in the sale deed, the actual property to which the right of property is attached is ear-marked and specified in the sale-deed. Where from the sale-deed it can be ascertained what is the share, area of property or interest in the village which the stranger has purchased, that share, area or interest alone can be the object of pre-emption in the suit.

Where the sale-deed does not on the face of it disclose the particular share or interest purchased by the co-sharer on his own behalf, as distinct from the share or interest purchased by the stranger...the bargain...is one joint in all its incidents.

(3). Where there is no specification of shares or proportions of purchase-money and the only mention in the deed is as to the shares each would take on partition, the transaction is joint.

P. R. 44 of 1883.

In this case there was no specification of shares or of purchase-money, but it was provided in the sale-deed that, in case of partition, each vendee would take particular plots; held the transaction was a joint one.

(4). The mere fact that properties are sold to different people in one and the same sale-deed will not make the sale a joint and indivisible one.

P. R. 28 of 1899.

The vendors conveyed their rights by the same deed to the vendees, but it was clear that the sales by the vendors were, nevertheless, two distinct transactions, each of the vendors selling his own share.

Held the mere fact of their executing a single deed or of the land coming from the same source does not make the transaction a joint one and plaintiff could therefore bring his claim in respect of either transaction.

(5). The specification may be anywhere in the deed or the schedule.

XIX All. 148.

Referring to N. W. P. H. C. R. 1870, the Court wrongly in our opinion held that there was no specification. The Court conceived that the specification in the schedule at the foot of the deed of sale could not be read into the body of the sale-deed as part of the contract between the vendor and the vendee. In our opinion it formed part of the contract.

Contra.—

N. W. P. H. C. R. 1870, p. 343.

The deed itself contained no specification, but the specification was given in a schedule at the foot, and the ruling refused to admit there were any separate contracts.

85. Stranger.

The term stranger in the Law of Pre-emption simply means the opposite to pre-emptor. All persons therefore not entitled to pre-empt are strangers.

V All. 65.

The word stranger in the Muhammadan Law of pre-emption has no reference to relationship, the word is a correlative term to pre-emptor.

86. Street.

See Common Entrance, p. 57.

87. Sub-division of the Estate.

No definition of the term sub-division of the estate is given in the Act.

The following points, however, will assist in determining, in any particular case, whether a so-called sub-division is one or not.

(1). It must be well-recognized, territorial, having distinct attributes and not merely an arbitrary association.

(i). P. R. 169 of 1889.

There is nothing in section 12, Punjab Laws Act, which leads us to believe that the term sub-division is to be construed with reference to any particular principle of division. All that it is necessary to show is that the village is divided into recognized sub-divisions.

(ii) P. R. 69 of 1893.

The sub-divisions should be recognized ones.

(iii). P. R. 76 of 1894.

The test applied to the particular case was whether there was a real territorial sub-division with a separate group of landowners.

(iv). P. R. 45 of 1897.

So-called sub-divisions were held not to be sub-divisions because there were no territorial sub-divisions, and were therefore not recognized ones.

(v). C. A. 518 of 1902.

There must be some one or more well defined attribute to justify treatment of a section of the village as a sub-division for the purposes of section 12 (c), Panjab Laws Act, such for instance as homogeneity of area or descent of the proprietors.

As these circumstances did not exist, held in the particular case that there were no recognized sub-divisions for the purposes of pre-emption.

In determining the point the first thing to look at is the history of the village.

(vi). Section 17 (c), Act of 1912.

(Note.—This section substitutes the words “recognized sub-division” for *patti*, but the latter word is retained in section 15).

(2). They should probably be noted in the Settlement records as sub-divisions.

(i). P. R. 69 of 1893.

Sub-divisions were accepted as such because they were so recognized by the Settlement records.

(ii). P. R. 45 of 1897.

Alleged sub-divisions were held not to be such, partly because the Settlement records did not recognize any *pattis*.

(iii). P. R. 89 of 1900.

Tor Shahpur was part of the village of Mauza Shahpur, Tahsil Shujabad, Multan, which, by reason of river action, comes up on different sides of the Indus. There were certain *thulas* of an indefinite character unrecognized in the Settlement records.

Held, there were no sub-divisions or *thullas* therein in the meaning of the Act.

(3). Not merely main sub-divisions, but minor sub-divisions may be sub-divisions within the meaning of the Act.

(i). P. R. 10 of 1884.

Mauza Budla, Tahsil Hoshiarpur, has *pattis* sub-divided into *dheris*.

Held, the *dheri* is a sub-division.

(Note.—In the case there was a question as to whether a custom existed limiting the term co-sharer to a co-sharer in a *dheri*, but no decision was arrived at).

(ii). P. R. 69 of 1893.

There appears to us to be no straining of the language necessary to enable us to hold that a village sub-divided into *pattis*, which are again sub-divided

into *thullas*, may be not incorrectly spoken of as sub-divisions into *thullas*. We are of opinion that it was the intention of the Legislature not only to recognize the main or primary sub-divisions of the village, but also any further divisions of such sub-divisions as are well marked and authenticated by the Settlement records and the history of the village.

Minor sub-divisions recognized by the Settlement records are sub-divisions under the Act just as much as main ones, be they *taraf*, *patti*, *thulla* or *dheri*.

(iii). P. R. 76 of 1894.

Where a *patti* is sub-divided into *thullas*, a *thulla* may be a sub-division of the village.

It is argued that a *patti* or other sub-division of the village means a *patti* or some co-ordinate sub-division, and a subordinate sub-division is excluded. I think the proper interpretation is to regard *patti* as being a mere example of a sub-division and not as denoting the main or principal sub-division or a sub-division expressly so named. In each case, as it arises, it must be determined whether a particular sub-division is or is not a sub-division of the village. It may be that in one village a *taraf* is a sub-division and the *pattis* in a *taraf* are not, and in another that the *pattis* also are and possibly *thullas* within the *patti*.

(iv) Section 15, secondly, Pre-emption Act.

(4). But all minor sub-divisions are not necessarily sub-divisions within the meaning of the Act.

(i). P. R. 44 of 1892.

It is possible that section 12 (d), Punjab Laws Act, may not be applicable to such minor sub-divisions as *dheris* of *pattis*, and in the particular case the *patti* was held to be the sub-division.

(ii). P. R. 76 of 1894.

It does not by any means follow that every sub-division, however minute, of the first and main sub-division is a sub-division within the meaning of these clauses, and it is neither necessary nor desirable to attempt to lay down any general rule on the subject.

(iii). P. R. 11 of 1877.

A quære was raised as to whether co-sharership in a *khata* can be treated as ownership in a sub-division.

The better view undoubtedly is, I think, that a *khata* is not a sub-division within the meaning of the Act.

(5). The non-territorial division of the village into tribal groups will not form sub-divisions by itself, even if the lands of the tribes are practically grouped according to tribe.

P. R. 45 of 1897

In Mauza Jhallian Khurd, Ambala, the proprietary body consists of Sainis and Jats. A Saini sold to a Jat and another Saini sued to pre-empt, alleging the village contained 2 *pattis* named after the tribes, and that the land sold was in the Saini *patti*.

The evidence showed that the village had two sections, one of 8 Jat ploughs, the other of 4 Saini ploughs, that the revenue was distributed over

the ploughs in this proportion, that both tribes had separate lambardars, that the Sainis had their land in the east of the village and cultivated nearly all the land on the south-east, the remaining land being occupied by Jats, that the Sainis occupied a few fields in the Jat section and *vice versa*, and that the *shamilat* was joint of both and scattered everywhere among the cultivated fields. There was admittedly no territorial division between the two groups, nor did the Settlement records recognize any *pattis*, while the *shamilat* had been divided recently, not according to *pattis*, but according to *khewat* among the proprietors taking the village as a whole.

The *shajra nash* stated there were no *pattis*.

Held that, though there were some points of differentiation between the Saini and Jat proprietors, they did not represent two distinct *pattis* or other recognized sub division in the village in the meaning of the Panjab Laws Act.

(6) A sub-division for the purpose of collecting revenue only may be a sub-division.

P. R. 169 of 1889.

A sub-division does not exclude a *taraf* made only with the object of dividing the *asamis* for revenue paying purposes among the lambardars.

But see P. R. 76 of 1894.

The *thulla* in question was held not to be a mere name representing a distribution for convenience in collecting revenue or similar purpose, but a real territorial sub-division with a separate group of landowners.

Consequently ruling P. R. 169 of 1889 should be applied with great caution.

(7). Even where the *Wajib-ul-arz* refers to *thullas* as the sub-divisions for the purpose of pre-emption any major sub-division would also be a sub-division under the Act.

P. R. 3 of 1903.

Mauza Kharkhoda, Tahsil Sampla, Rohtak, is a village divided into two *pannas*, and each *panna* into two *thullas*. Plaintiffs claimed pre-emption because their land and the land in dispute, though in different *thullas*, were in the same *panna*, whereas the vendees owned land in another *panna* only.

The vendee resisted the claim on the ground that the *Wajib-ul-arz* said "the alienor will alienate first to his brothers and near relations and in case of their refusal to the proprietors of the same *thulla*, and in case they decline the alienor is at liberty to alienate to anyone he pleases."

Held section 12 (c), Panjab Laws Act, applied, that the *pannas* were sub-divisions under that section and that the pre-emptive rights of the plaintiff were superior.

(8). The sub-division must be an existing one, and not one which has been superseded.

XXXI All. 274.

By custom the right of pre-emption vested in share-holders in a *patti*, then in those of the *mahal*, lastly in those of the village. The village was sub-divided into several *thokes*.

One of the *thokes*, viz., Jaraoli, was subsequently sub-divided into several *mahals* and the *thokes* were done away with.

A share was sold in the *thokes* so sub-divided and was purchased by a co-sharer in one of the other old *thokes*. A co-sharer in one of the *mahals* of *thoke* Jaraoli sued to pre-empt.

Held, the vendee being a co-sharer in the village, the plaintiff had no preferential right of pre-emption, inasmuch as the old *patti* and *thokes* had been done away with,

(9) In the following villages sub-divisions have been held to exist.

(i) P. R. 10 of 1884.

Mauza Budla, Hoshiarpur, dheris.

(ii). P. R. 169 of 1889.

Rawalpindi.

(iii). P. R. 44 of 1892.

Mauza Kadirpur, Amritsar, pattis

(iv). P. R. 69 of 1893.

Mauza Badhowal, Ludhiana, pattis and thullas.

The village was divided into *pattis* and the *pattis* into *thullas*. Held the *thullas* were sub-divisions.

(v). P. R. 76 of 1894.

Mauza Mandiala Kala, Ambala, pattis and thullas.

The village was originally held on 24 ploughs, afterwards arranged into two *pattis*. In one *patti* there was no sub-division, in the other there were two *thullas*, each of 6 ploughs, formed on the basis of descent and relationship.

(vi). P. R. 3 of 1903.

Mauza Kharkhanda, Tahsil Sampla, Rohtak, pannas and thullas.

(10). In the following sub-divisions have been held not to exist.

(i). P. R. 45 of 1897.

Mauza Jhallian Khurd, Ambala.

(ii). P. R. 89 of 1900.

Mauza Shahpur, Tahsil Shujabad, Multan.

(iii). C. A. 518 of 1902.

Mauza Pheru Shahr, Ferozepur, zails.

It appeared from the Settlement records that the *zails*, like other *zails* in the village, were constituted by mere arbitrary grouping together of certain holdings so as to form an association of proprietors with no connecting ties of any great sort, and that they had a *shamilat* in common and a common lambardar.

38. Sub-division of a Town :—

No definition of the term "sub-division of a town" has been given in the Act, but, in determining whether a particular locality is a sub-division or not, the following matters will serve as a guide.

(1). The question is one of fact and not of law.

P. R. 64 of 1887.

It is clear that a particular town or city may or may not, as a matter of fact comprise recognized sub-divisions, and I entertain no doubt that it is a matter of fact both whether the town or city comprises sub-divisions and what the sub-divisions are which are comprised in it.

(2). The sub-division must be one well-recognized as such.

(i). P. R. 154 of 1882, 29 of 1888, 44 of 1903.

(ii). P. R. 16 of 1902.

The whole town of Bhiwani must have been built by taking agricultural land for building purposes. If the boundaries of any well-known portion of ground taken up for building purposes have been remembered and preserved a sub-division may have been constituted.

(iii). P. R. 42 of 1906.

Tarf Ravi, Multan is a sub-division, because it is known to the inhabitants as a definite locality, is a suburb which has grown up in the boundaries of an old village and is a suburb round the gates.

(3). The sub-division must be a main one, and, unlike sub-divisions of an estate, minor sub-divisions of a main sub-division are not sub-divisions for the purposes of the Act.

(i). P. R. 154 of 1882.

The word sub-division in section 11, Act IV of 1872, is intended to refer to main sub-divisions or quarters of the town or city, and not merely to lanes and streets therein.

(ii). P. R. 29 of 1888.

The term sub-division means a main division or quarter.

In Peshawar, where there are five recognized sub-divisions or main quarters of the city, each of which contains a number of *mohallas*, these main quarters, and not the *mohallas*, are the sub-divisions contemplated by the Act.

(iii). P. R. 44 of 1903.

It is obvious that where a town is divided into *mohallas* or quarters, and the *mohallas* are again sub-divided into sections, called after names of streets or lanes along which houses are grouped, both cannot be treated as sub-divisions.

We agree that the section refers to main sub-divisions of a city, not to lanes or streets within such sub-divisions.

(iv). P. R. 52 of 1903.

We think that the sub-division should be taken to be the main sub-division and not the *mohallas* or *kuchas* into which it is divided.

(4). Size is a requisite for a sub-division, speaking generally, and the greatest caution should be exercised in holding a small area as a sub-division.

(i). P. R. 42 of 1891.

A locality consisting of only 70 houses held not to be a sub-division.

(ii). P. R. 103 of 1892.

A street held not to be a sub-division.

(iii). P. R. 83 of 1901.

It is not contended that small lanes, *bazars* or areas usually fall within the term sub-division, and a *chauhatta*, i.e., the shops at the four corners formed by the meeting of four streets, is not a sub-division.

(iv). P. R. 16 of 1902.

For the purposes of the law of pre-emption it is essential a sub-division should be compact and of a reasonable size, and not scattered.

(v). P. R. 113 of 1906.

It is impossible to treat a little group of some 15 houses as a sub-division by itself.

(vi). P. R. 67 of 1907.

The *mohalla* is quite small and said to contain 15 or 20 houses only. I am inclined to agree that the *mohalla* is not itself a sub-division of the town.

(vii). P. R. 35 of 1908.

Recognition of single lanes or streets as sub-divisions is opposed to the principles governing suits for pre-emption in towns.

(viii). P. R. 19 of 1909.

A *mohalla* consisting of seven houses is not a separate sub-division under the Act.

(ix). P. R. 70 of 1909.

A locality being of small area and formerly a *serai* with no passage through it, held not to be a sub-division.

Compare :—

P. R. 44 of 1903.

Size is doubtless an important point in deciding whether a place is a sub-division, but every case must be judged by its own facts and no hard or fast rule can be laid down.

(5). The demarcation of boundaries is not necessary to hold that a sub-division exists.

P. R. 44 of 1903.

From the difficulty in laying down the exact boundaries of a sub-division it does not follow that the sub-division itself does not exist.

(6). There should be definite proof that the sub-division does exist and the Court should not invent one.

P. R. 2 of 1903.

It is not for the Court to invent a sub-division, and, if the matter is eventually left indefinite, it is not the vendee who thereby has to suffer, but rather the pre-emptor who has to prove the incidents of the custom.

(7). If the town is large, there is *prima facie* good ground for thinking it is divided into sub-divisions.

P. R. 44 of 1903.

(8). Suburbs outside the main city have generally been treated as separate sub-divisions.

See P. R. 68 of 1879, 87 of 1890, 70 of 1898, C. A. 496 of 1903, P. R. 42 of 1906, 57 of 1906, 90 of 1907, and 84 of 1910.

(9). The term sub-division may include a *mohalla*.

(i). P. R. 154 of 1882.

The term would include a *mohalla* and also what is known as a *katra* in the city of Amritsar.

(ii). P. R. 55 of 1880.

A *mohalla* is a sub-division under Act XII of 1878.

(iii). P. R. 29 of 1888.

Where *mohallas* and *katras* are the only recognized main divisions of a town these may be sub-divisions under the Act.

(10). A sub-division for other purposes is not necessarily a sub-division for the purposes of the Act.

(i). P. R. 69 of 1893.

It does not follow that the principle of recognizing sub-divisions in village lands which are recognized by the Settlement records as sub-divisions should be followed in the case of towns.

(ii). P. R. 120 of 1906.

It does not follow that sub-divisions for other purposes, e.g., wards are sub-divisions under the Act.

(11). For localities held to be or not to be sub-divisions, *vide* Appendix II.

39. Superior and Inferior Proprietors.

The status and origins of these proprietors are given in full in Douie's Settlement Manual, paras. 143-146 and 168-171.

It is unnecessary to produce here the authoritative account given in that work.

The term "inferior proprietor" does not include a *muqarridar* :—

10 P. R. Rev. 1896.

In the Rawalpindi district a *muqarridar* is a tenant but there is a difference between his status and that of an ordinary tenant with right of occupancy.—Douie's Settlement Manual, para. 213 (2).

As therefore he is an occupancy tenant, and not a proprietor, it would appear he has, *qua muqarridar*, the same right of pre-emption as an occupancy tenant.

As a person entitled to inherit, as an agnate or a co-sharer he might pre-empt, but not otherwise.

P. R. 67 of 1890 held, also, that a *muqarridar* is not an inferior proprietor, but "a tenant with a right of occupancy of a peculiarly exalted kind," so also P. R. 5 of 1873, P. R. 47 of 1879 and P. R. 16 of 1905.

40. Town.—

(a). No definition of the term is given in the Act, but under section 3, clause (3), (a) a specified place shall be deemed to be a town if so declared by the Local Government in the official Gazette, and under section 3, cl. (3) (b), if so found by the Courts.

Appendix III contains the places so declared by the Local Government, and Appendix III A shows places treated by the Courts as towns, though not gazetted as such.

In only two cases, that of Mauza Rori in P. R. 26 of 1910 and Parao Lala Musa in P. R. 89 of 1910, have the Courts held that a place sought to be declared a town is not a town.

It may be broadly laid down that anywhere under the rule of a Municipal Committee will be a town for the purpose of the Act, probably also some Notified areas. The safest definition appears to be an area inhabited by residents not bound together by a common interest in agriculture, that is, a place which depends mainly on trade.

It would probably not be safe to call an area a town if it had less than about 3,500 inhabitants, the history of the place should be considered, and the question of the structure of the locality is also a matter to enquire into.

(b). The following cases will show matters which were considered by the Chief Court in determining whether a place was not a town:—

(i). P. R. 40 of 1902.

Though the culturable land of Kasur is held by a village community, Kasur having 20,000 inhabitants the law as regards the town would be the law applicable to towns.

(ii). P. R. 51 of 1907.

Una is a town, because it is a municipal area, has a population of 4,000 to 5,000, with an agricultural area of 700 ghamaons outside municipal limits. The Gazetteer calls it a town, it has one main street of shops, built mostly of masonry and used to be an emporium of trade.

P. R. 32 of 1909.

(iii). Khem Karn is a town. It has 5,500 inhabitants, a long history, is walled, has paved streets, two or three good bazars, a *baoli*, public buildings, a school and a police station.

(iv). P. R. 26 of 1910.

Mauza Rori (*Tahsil Sirsa*, Hissar) is not a town. It has no Municipal Committee, it is not noted in the Gazetteer as a town, its population is 3,300, has 600 houses, and an agricultural area of 11,500 acres.

The fact that some 40 or 50 houses are *pakka* and that 10 or 12 inhabitants pay income tax do not of themselves justify the conclusion that it is a town.

(c). The question of suburbs, which have grown up within recent times on agricultural land, has not been dealt with in the Act.

The rulings, however, show that when a suburb has grown up and the new area is devoted to commercial pursuits, such areas must be considered as "towns," and subject to the urban rules of pre-emption, notwithstanding the fact that they be situated in adjoining villages assessed to revenue.

(i). P. R. 87 of 1890.

Bazar Tahsilwala, suburbs of Batala.

The site is outside the city, and the suit related to shops, a *chaubara* and waste land. The *bazar* was built about 1868 on a graveyard adjoining one of the gates of Batala, which in Settlement was in the boundaries of *Mauza Faizpur*.

Held, that the property should be regarded as situate in a town. If anywhere during currency of settlement a town or sub-division of a town has grown up, the terms of section 11, Panjab Laws Act, require us to recognize the fact, and to apply the law as it is thereby modified, that is, if in the interval a village site has grown into a town, the presumption goes and proof of custom must be given.

This suburb was held to be in a town because it was in immediate proximity to a large town and was occupied by shops, a grain market and such like commercial buildings.

(ii). P. R. 70 of 1898.

Plaintiff sued to pre-empt certain land, which, though formerly agricultural, was at the date of suit situate in an outgrowth of Batala, and was occupied by shop or business premises and not by dwelling houses.

Held, the claim must be treated as one in respect of property which, though formerly agricultural land, should now be regarded as subject to urban rules.

(iii). P. R. 42 of 1906.

Tarf Ravi Multan.

The site was agricultural land in 1873 outside the city walls, and near one of the gates, but was built on after and included in Municipal limits. Held to be a suburb and to follow rules re urban property.

(iv). P. R. 90 of 1907.

A plot of land originally in *Mauza Killa Gujar Shah*, a suburb of Lahore City, and formerly agricultural land, had been used as a site for building purposes and been gradually absorbed in the limits of Lahore City. Held, the land must be regarded as land situated in a town and therefore there was no presumption of custom.

(v). P. R. 84 of 1910.

A new *abadi* in limits of old village adjoining Hafizabad dealt with as a sub-division of a town.

(d). Where a cantonment has been notified as a town that will not operate to give a right of pre-emption there.

P. R. 9 of 1911.

Notwithstanding Punjab Government Notification No. 677, dated the 10th November 1908, declaring Rawalpindi City and Cantonment to be a town under section 3 (3), a suit for pre-emption in regard to house property in the Cantonment is barred by section 7 (1) of the Act.

41. Tribe.

(a.) See Agricultural Tribe.

(b.) Tribe (not being an agricultural tribe) as used in section 11, Act II of 1905, indicates main tribe, and not the *got* or other sub-division of the tribe.

P. R. 112 of 1908.

The expression "tribe" in the Panjab Pre-emption Act means the main tribe, and not sub-divisions and so Sheikhs of all denominations form one tribe under section 11.

P. R. 62 of 1909.

The word "tribe" in section 11, Part II of the Pre-emption Act, covers the whole group of Aroras in the village, who satisfy the conditions laid down in that section and not merely the *got*.

P. R. 87 of 1910.

Aroras of the Multan district are not a sub-division of Khatris or members of the same tribe under section 11.

(c.) *Onus* :—

P. R. 87 1910.

The *onus* of proving a person is of the same tribe as the vendor is on the plaintiff asserting.

(d.) Under Act of 1913 the term has disappeared and it will not arise in new cases.

42. Village.

No definition of the word "village" is given in the Act. It is something quite distinct from the phrase "village community", which regarded the relations of persons living in a particular area while the word "village" connotes simply the area itself.

The word is not co-incident with the term "estate", as defined in the Land Revenue Act, nor would the term "village" necessarily include every "estate", *e.g.*, the civil lines of several large stations are parts of estates, yet it would not be correct to apply rules relating to ordinary villages to such cases. It will suffice to mention the civil station of Delhi, which is in the village area of Mauza Chandraul, and yet forms part of the Municipal area of Delhi City. There can be no question, I think, that urban rules, and not village rules, would apply to the sale of a bungalow situated therein.

This I consider is the effect also of

P. R. 103 of 1889.

Jahannuma, one of the suburbs of Delhi, formerly one of the Taini villages of the King of Delhi, (*i.e.* attached to the Privy Purse), though it is a separate area, but not assessed to revenue, and having no proprietary body,

and occupied only by scattered buildings and gardens, is not a village community. *Cf.* also suburbs, p. 110.

Further the term would, I think, include areas not an estate, *e.g.*, immoveable property in the *chak* referred to in P. R. 21 of 1906 would now follow the rules of village and not urban property (subject of course to their exclusion from pre-emption under the Colonies Act).

P. R. 21 of 1906.

In a certain *chak* No. 296 in the Chenab Colony, demarcated and numbered by Government and partly allotted to grantees, lamboardars had been appointed and a *chaukidar* entertained, and there was common responsibility for maintenance of water courses, but the *chak* had not yet become an estate as defined in the Land Revenue Act, no record of rights having been prepared, no joint responsibility for revenue declared, and the *chak* not having been assessed as an estate to land revenue.

Held, the *chak* was not a village, nor its inhabitants a village community.

The Act seems to have divided areas into two kinds, *viz.*, towns and villages, and whatever therefore is not a town is a village. It is impossible to define the term better. It would appear to mean, so far as the Panjab is concerned, the area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto, but the presumption appears to be that every area is a village unless and until it is proved to be a town.

See also "Village site."

43. Village Site.

(a). This term is used in section 3 (2), Act II of 1905, but in the corresponding section of Act I of 1913 the word "village" alone is used. It is, I think, obviously something different to village, and something different to estate.

The question as to what "village site" means is of great importance to cases occurring under Act II of 1905, because if it means the whole area of a village including the land then all immoveable property situate therein is liable to pre-emption, but if it means only the *abadi deh*, then property outside the *abadi*, other than agricultural land, would be not subject to pre-emption.

The natural meaning I think is the *abadi deh*, that is, the collection of houses within the village, in which the villagers reside.

In P. R. 89 of 1910 we have contrary opinions expressed but no ruling.

RYVES, J :—

The word "village" (should be village site) in section 3 (2) does not mean a collection of houses but the whole estate, and village immoveable property applies to all immoveable property in the limits of a village.

SCOTT-SMITH, J :—

The expression "village site" cannot be considered synonymous with "village" or "estate," but means the inhabited part of the village or "*abadi deh*."

(b). An extension, however, of the village inhabited quarter in the boundaries of the village make such extension part of the village site.

P. R. 89 of 1910.

I D sold a house situate in the *abadi* known as Parao Lala Musa. It appeared that many years ago Government established a parao in the immediate vicinity and constructed a number of shops. The *bazar* had since grown and included shops and houses. The land of the parao was in *mauza* Dhaman, and the *bazar* included land there and in *mauza* Said Gul. It was contended that the house was not village immoveable property, as the *abadi* Parao Lala Musa lay at a distance from what was generally known as the *abadi* of *mauza* Dhaman and *mauza* Said Gul.

Held, if extensions are made to the existing *abadi* of a village, or if a hitherto unoccupied site within the boundaries of the village is built over and settled upon, such new buildings would become "village immoveable property."

(c). The word "village" now used in section 3 (2), Act of 1913, undoubtedly refers to the whole village area, and the doubt as to whether village immoveable property, not being agricultural land, situate outside the *abadi* was liable to pre-emption, on a strict interpretation of the Act of 1905 cannot arise in cases where the sale was completed after the commencement of the Act of 1913.

CHAPTER IV.

NATURE OF THE PRE-EMPTIVE RIGHT.

1. Partial definition in the Act.
2. The right of pre-emption is—
 - A.—A primary and secondary right existing before sale and enforceable when a sale takes place.
 - B.—A right of substitution and not of repurchase.
 - (a) development and acceptance of the doctrine ;
 - (b) date from which substitution takes effect—
 - (1) date when the decretal money is paid ;
 - (2) date when possession under the decree is taken ;
 - (3) date of institution of suit ;
 - (4) date of sale ;
 - (c) reconciliation of the divergent views ;
 - (d) application of the doctrine of substitution to—
 - (1) encumbrances created by the vendee ;
 - (2) improvements effected by the vendee ;
 - (3) *ad interim* profits ;
 - (4) deterioration caused by the vendee ;
 - (e) results of the doctrine of substitution—
 - (1) the pre-emptor must take over the whole bargain ;
 - (a) the rule applies to cases
 - α where the pre-emptor is partly disentitled by his own acts ;
 - β where other equally entitled pre-emptors sue ;
 - γ of compromise between the vendee and pre-emptor.
 - δ where the pre-emptor has different qualifications ;
 - ϵ where the pre-emptor was a co-vendor ;

(b) and is limited—

- α to the extent of the pre-emptor's right ;
- β to the vendor's undoubted title to sell ;
- γ to one sale when there are coincident sales ;
- δ where there is a specification of interests ;

(c) the strictness of the rule prohibits amendment of the plaint ;

(2) the pre-emptor takes over all rights and obligations incident to the bargain, and therefore

(a) acquires the following rights :—

α to recover outstandings accorded to the vendee ;

β to keep alive the vendee's pre-existing mortgage as a shield ;

γ to take over a mortgage favouring the purchaser of the equity of redemption ;

δ to pre-empt subsequent sales ;

but not

α to adopt the same terms and method of payment as arranged between the vendor and vendee ;

β the benefits of personal covenants between the vendor and vendee ;

(b) takes over the following obligations :—

α the risk of a defective title in the vendor ;

β to pay off the vendor's encumbrances ;

γ to pay off a mortgage redeemed by the vendee ;

δ to perform the purposes for which the sale was made ;

(3) the vendor cannot retract from the sale.

C. A preferential right.

D. A personal right and therefore it is—

(1) a simple personal right ;

(2) not a right attached to land ;

(3) a *jus ad rem alienam acquirendam* and not a *jus in re aliena* ;

(4) not a right to or in immoveable property ; and does not

(1) require registration when transferred ;

(2) admit of a transfer of the right to pre-empt prior sales ; and

- (3) is lost if the pre-emptor seeks the benefit of another ;
- (4) is lost if the pre-emptor bargains with his right ;
- (5) is lost if the person entitled to buy joins a stranger with him in the purchase ;
- (6) is not lost by a decree in another's favour when the pre-emptor was no party to the suit ;
- (7) though not transferable it descends to the heir possessed of the statutory qualifications ;
- (8) is not lost if the pre-emptor sues with a stranger.

3. The comparison and retention of statutory qualifications ;

- (a) the superior qualifications must be possessed by the pre-emptor immediately before and at the time of sale and cannot be acquired subsequent to the sale ;
- (b) the preferential right once possessed by the plaintiff at the time of and immediately before sale cannot be affected by the acquisition of equal or superior rights by the vendee—
 - (1) by an act coincident with the sale ;
 - (2) by an act subsequent to the sale ;
- (c) the period for comparison of the qualifications of the pre-emptor and vendee is—
 - (1) the date of sale ; but held sometimes to be
 - (2) the date of institution of the suit ;
 - (3) the date of decree ;
- (d) the pre-emptor must retain his statutory qualifications until—
 - (1) decree ; but held in
 - (2) at least till institution ;
 - (3) not after sale ; and
 - (4) cannot be lost after decree and pending appeal ;
- (e) the qualifications can be lost—
 - (1) by acts of the pre-emptor ;
 - (2) by acts outside the control of the pre-emptor ;
- (f) the vendee need not retain his superior qualifications after sale in order to defeat the pre-emptor ;
- (g) the qualifications which have to be compared must be indefeasible ;

- (h) a vendee can only resist if he has equal or superior rights ;
- (i) where the vendee has conveyed to a third person, the comparison of qualifications will be between the pre-emptor and the new vendee, and a new vendee *ante litem* can defeat the pre-emptor, but—
 - (1) a reconveyance to the original vendor will not defeat the pre-emptor ;
 - (2) there are doubts as to the law when a conveyance is made *pendente lite*—
 - (a) rulings that a sale *pendente lite* does not affect the plaintiff's right ;
 - (b) rulings that a sale *pendente lite* to a person with equal or superior qualifications defeats the pre-emptor ;
 - (3) the rule only applies if the reconveyance has been a *bonâ fide* transfer ;
 - (4) the rule is not applicable if the second vendee purchasing *ante litem* would have been barred from suing himself ;
 - (5) a suit becomes pending when filed ;
 - (6) if the new vendee *pendente lite* is impleaded and the case goes to issue as to qualifications *lis pendens* cannot be relied on ;
 - (7) the rule applies when the transfer is made *pendente lite* to a superior pre-emptor whose claim to pre-empt is time-barred.

CHAPTER IV.

NATURE OF THE PRE-EMPTIVE RIGHT.

1. The present Act has given in section 4 a partial definition only of the right of pre-emption. It has defined it as a right to acquire property in preference to other persons, but the right of pre-emption is considerably more than this.

It is proposed in the following chapter to discuss the various features of the pre-emptive right, and show the consequences flowing from these different features.

It should, however, be noted that these characteristics of the right of pre-emption have been almost entirely evolved from the Muhammadan Law, and, though the analogies of Muhammadan Law are not applicable to pre-emption in the Punjab (*vide* Chapter I, Origins), the Courts in the Punjab have, as a matter of fact, applied them.

2. The right of pre-emption is:—

- A. A primary and secondary right, existing before sale and enforceable when a sale takes place.
- B. It is a right of substitution, and not of re-purchase.
- C. It is a preferential right.
- D. It is a personal right, and not a right to or in immoveable property.

It is proposed to give the various rulings establishing these four propositions, and to show the consequences which flow therefrom.

A. The right is a primary one existing before sale, and a secondary one giving a right to enforce it when a sale has been effected.

(i) VII All. 775.

Mahmud, J.:—

The cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement. The right arises antecedently to sale, and the sale is a condition precedent, not to the existence of the right, but only to its enforceability.

Inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised.... The very conception of pre-emption in Muhammadan Law necessarily involves the existence of the right before the sale in respect of which it may be exercised,

(ii) P. R. 98 of 1894.

Plowden, J. :—

The primary obligation not to sell independently of the co-sharer's assent is not to be confounded with the obligations subsidiary to or consequential upon the primary right when a sale is contemplated, or when a sale has been made irrespective of the assent of other co-sharers. The vendor, in making an offer to the co-sharers, only takes a step towards discharging his obligation not to sell irrespective of the assent of his co-sharers, and the right to relief is clearly a secondary right arising upon breach of the primary obligation.

(iii) P. R. 90 of 1909, Majority.

(a) Clark, C. J. :—

I agree as to there being a potential right of pre-emption which exists prior to any sale. It is true that there is no cause of action until the sale has taken place, but this does not show that there has been no previous right.

(b) Chatterji, J. :—

I consider that the right of pre-emption is a substantive and primary right, which is possessed by or inheres in the pre-emptor, and imposes a corresponding obligation in the vendor of the property, which is the subject of pre-emption.

The limitations of this right are many, and it comes into play or arises only on the happening of a certain contingency.

Thus it may be termed potential for want of a better expression and becomes actual when the necessary contingency has come into existence.

(c) Shahdin, J. :—

The right of pre-emption like other rights has to be regarded in a twofold aspect (1) as a primary or antecedent right and (2) as a secondary remedial right. Viewed as an antecedent right, it exists before and independently of any wrongful act or omission, that is to say, it entitles the person of inherence, in preference to a third person or a class of persons, to an offer of sale of the property, which is the object of the right, by the person of incidence, upon whom a corresponding primary duty to make such offer is laid.

Viewed as a remedial right, it comes into existence after the primary right has been infringed by a sale of the property in question being made by the person of incidence to such person or class of persons, and its purpose is the removal of the injury complained of by the substitution of the person of inherence for the vendee or vendees, who aided in the infringement of the primary right.

An unauthorized sale, therefore, being a violation of the primary right of pre-emption, can only give rise to the secondary right of pre-emption, and because this secondary right does not, as it cannot, come into existence before a sale to a person with an inferior right to the person of inherence has taken place, it is incorrect to say that the primary right of pre-emption does not exist before the sale in question.

In the Punjab, broadly speaking, the primary right of pre-emption is a right possessed to insist that a vendor shall make the first offer of sale to a person entitled to it, and further if the sale is made without the offer, then the secondary right of pre-emption, to claim substitution, arises.

It seems clear to my mind the right of pre-emption can only arise because, before the sale, a primary right resided in the person in whose favour the secondary right accrues by reason of the sale.

Contra :—

Rattigan, J. :—

My view is that the pre-emptor has no cause of action until the sale actually takes place. Till then, he has no right whatsoever, for the simple reason that, until the sale is completed, it cannot be said that he has a preferential right to that of the vendee. There is no right of pre-emption in being in the plaintiff until the sale is completed in the defendant-vendee's favour.

Until a sale is actually completed, no person can assert that he has a right of pre-emption. In my opinion a right of pre-emption can only arise, if, when the sale is completed, the vendee happens to stand in a position of inferiority as regards another favoured person.

(iv) XII All. 234.

Mahmud, J. :—

The right of pre-emption in its inchoate form exists in the pre-emptor antecedently to the sale of which he complains, or if it were not so, jurisprudence would decline to recognize that a right, which did not exist at the time of the sale, is created by the very sale which is complained of as injuria to the right which that injury itself created.

(v) P. R. 10 of 1909.

The right of pre-emption exists in a potential form with respect to immoveable property in a particular person or persons before the sale of such property takes place and becomes an actuality at the completion of the bargain.

(vi) P. R. 136 of 1894.

The right to the offer of a thing about to be sold is the primary right of the pre-emptor.

The secondary right is to follow the thing sold, when sold without a proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale made in disregard of his preferential right.

Contra :—

(i) Rattigan, J., in P. R. 90 of 1909, *vide supra*. p. 121.

(ii) IV B. L. R. 134.

The right of pre-emption under Muhammadan Law does not exist before actual sale, because on the one hand the pre-emptor has no right of prohibiting the sale, and on the other hand, the vendor is not bound to offer the property for purchase to the pre-emptor before selling it to the stranger, for the pre-emptor cannot before such sale relinquish his pre-emptive right nor could the absence of his consent vitiate the sale.

B. The right of pre-emption is a right of substitution and not one of re-purchase.

(a) This view though indicated in prior judgments, was expounded in detail first of all in

(i) VII All. 775 F. B.

Mahmud, J. :—

Pre-emption is a right which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property to

obtain, in substitution for the buyer, proprietary possession of certain other immoveable property not his own, on such terms as those on which such latter immoveable property is sold to another person.

It amounts to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and thus affects his title which would otherwise amount to absolute dominion.

The right of pre-emption is not a right of re-purchase either from the vendor or the vendee, involving any new contract of sale, but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is in effect as if in a sale-deed the vendor's name were rubbed out and the pre-emptor's name inserted in its place.

The following rulings, and probably others, have accepted this view as correct :—

VII All. 482, VIII All. 502, XII All. 234, XXV All. 334, XXX All. 130, XXXII All. 45, XXXII All. 340, P. R. 34 of 1870, 27 of 1874, 134 of 1889, 30 of 1893 Note, C. A. 825 of 1900, C. A. 851 of 1901, P. R. 76 of 1902, 93 of 1902, 10 of 1909, 91 of 1909 (Rattigan and Chatterji, J.J.).

It is a view also which has never once been dissented from by either the Punjab or the Allahabad Courts.

Prior, however, to VII All. 775, the Calcutta Court propounded another view, *viz.*, that the right was one of re-purchase, but this ruling has, so far as I am aware, not been followed in any other ruling, and was expressly dissented from in VII All. 775. The ruling is—

IV B. L. R. 134.

Mitter, J. :—

Now, so far as I can judge of the Muhammadan Law of pre-emption from the materials within my reach, it appears perfectly clear that a right of pre-emption is nothing more than a mere right of re-purchase, not from the vendor, but from the vendee, who is treated for all intents and purposes as the full legal owner of the property which is the subject-matter of the right.

(b) Having seen that it is established that the right of pre-emption is one of substitution, we have to see from what date the substitution takes effect.

The rulings on this subject vary greatly, and no less than four possible dates are given in the different rulings.

They are :—

(1). From the date when the decretal money is paid.

(i) Wilson's Digest of Anglo-Muhammadan Law, para. 389.

The proprietary right of the pre-emptor is complete when, and not before, he has either taken possession with the vendees' consent or tendered the purchase-money under a decree.

(ii) N. W. P. S. D. A. Rep. 1865, vol. III, p. 171, N. W. P. H. C. R. 1866 Rev. App 30.

The pre-emptor can have no preferential right till he has tendered the full price.

(iii) VIII All. 502.

The substitution takes place when the pre-emptor actually enforces his pre-emption (*i. e.*, by payment).

(iv) XII All. 234.

The ordinary decree in a pre-emption suit must be regarded as one which merely avoided the sale to the vendee, and divested the original owners of all interest in the property as from the date when that decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emption price decreed, and vested in the pre-emptor the rights of ownership as from that date, and his rights were not postponed until he had obtained possession of the property.

(v) XXVI All. 61.

Until the pre-emptor has asserted his right, paid the pre-emption price, and thus got himself substituted for the vendor, the ownership of the property does not vest in him.

(vi) XXVIII All. 383.

The interest in the pre-empted property of a successful pre-emptor, who has not yet paid the pre-emptive price fixed by his decree is an interest, the attachment of which is prohibited by section 266, C. C. P.

(vii) P. R. 136 of 1894.

Even a decree in a suit, brought for the purpose of enforcing the right of pre-emption, does not give the proprietor a right to the thing sold. He does not acquire that right until he has paid the price fixed in the decree within the prescribed period and this he need not do unless he chooses. If he does so the right, title and interest of the vendor which had meantime vested in the vendee is divested, and vests in the pre-emptor, and then, and not till then, he has a right to the land itself.

(viii) P. R. 56 of 1896.

On the purchase money fixed by the decree being paid into Court, the pre-emptor's title was perfected.

(ix) P. R. 95 of 1091.

A pre-emptor is not bound to accept the offer, and when he does so or even gets a decree, he still has no interest of any kind in the property itself until he pays the price fixed within the appointed time.

(x) P. R. 94 of 1902.

It is, we think, clear under section 214, C. C. P., that the pre-emptor's right to or in the property accrues only when he has complied with the conditions laid down in the decree and paid the purchase money into Court, and it is then, and then only, that the property vests in him and is divested from the vendee.

(xi) P. R. 93 of 1902.

Clark, C. J. :—

There is great difficulty in holding the property vests in the pre-emptor from the date of the first sale, and that he acquires the land before he pays the price.

(xii) P. R. 124 of 1907.

A pre-emptor has no right or interest in the property pre-empted, until his right of pre-emption is duly established by the decree of the Court, and he has satisfied the terms of that decree.

(xiii) P. R. 91 of 1909.

Rattigan, J. :—

The claimant for pre-emption has no right, title, or interest in the property sought to be pre-empted until he pays the amount which the Court decrees to be payable by him for the purchase.

(xiv) Order XX, rule 14, C. C. P., sub-clause 1 (6).

(2) From the date when possession under the decree is obtained.

XII All. 234.

Mahmud, J. :—

The enforcement of pre-emption is deemed to have taken place when, by virtue of his pre-emption, the pre-emptor obtains possession of the pre-emptional tenement, either under a voluntary surrender thereof by the seller or the buyer, or under a decree, and, unless and until such enforcement has taken place, the buyer continues to remain the owner of the pre-empted property and it does not till then vest in the pre-emptor.

Under Muhammadan Law the ownership of pre-empted property does not, in the case of a successful pre-emptor, vest in him until he has actually enforced his right, whether by surrender by the purchaser or under decree of Court, and in either case his right of ownership does not take date from the time of the sale to the purchaser but from such surrender or decree.

With respect to the dictum in VII All. 775 that the right of pre-emption is one of substitution, Mahmud, J. proceeds :—

The substitution is not independent of the rules of law imposed thereupon as conditions precedent to and governing such substitution itself, and among such conditions is the condition that a pre-emptor's ownership does not vest in him till he actually enforces his right by surrender, by mutual consent or decree of Court, (that is the purchasers remained owners of the pre-empted share up to the date when the terms of the decree were fulfilled and enforced, and the ownership did not vest in the defendant from the date of the sale, notwithstanding his success in the pre-emptive suit, and his actual substitution as owner of the pre-empted property must date from his possession.)

(3) From the date of institution of the suit.

P. R. 10 of 1887.

The plaintiff is, in our opinion, entitled to be put in the position of the defendant vendee on the day on which he brought his suit.

(4) From the date of the sale.

(i) VII All. 674.

The pre-emptive right, when it is once established by suit, existed and must be presumed to have taken effect on the date when the sale took place.

(ii) XXXII All. 45.

It is true that the pre-emptor's right accrues on the date on which he pays into Court the amount of the consideration under the pre-emption decree, but the property which he secures is that which passed under the sale-deed, and not that property subject to mortgage created by the vendee subsequently to the sale.

(iii) P. R. 30 of 1893 Note.

The effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of the sale, which was a transaction voidable *ab initio* at the option of the pre-emptor. When the option is exercised, the sale as regards the original purchaser becomes void *ab initio*.

(iv) P. R. 46 of 1902.

Reid, J. :—

A pre-emptor's title antedates to the date of the sale.

(v) P. R. 93 of 1902, F. B.

Robertson, J. :—

I think the effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of sale which was a transaction voidable at the option of the pre-emptor.

Harris, J. :—

I would give due weight to the dictum in XII All. 234 that the pre-emptor's rights of ownership only vest in him on decree, though the expression vesting is of a somewhat indefinite character. But those rulings do not decide what is vested. . . . in other words whether it is the subject of bargain as it existed at the time of sale or as it exists at the time of suit. In my opinion the substitution and vesting are as to the bargain as it originally stood. The substitution is a substitution at the time of sale, and not at a later period, and if the word "vesting" is to be used, it is a vesting in what was sold.

(c) These four divergent views are to some extent irreconcilable, and none of them has been followed out to its logical conclusions. That expressed in P. R. 10 of 1887 is so far correct in that it avoids the difficulty of conflict with the doctrine of *lis pendens*, that of Mahmud, J., in XII All. 234, as well as the rulings that the substitution takes place from the date of the payment of decretal money, would appear to be in direct conflict with that doctrine, for if the view taken in those rulings is correct, it would be right to insist that all acts done by the vendee in the interval between the sale to him and the substitution, would be legally binding on the pre-emptor, even to the extent of the destruction of the property. In fact, these views appear to me to be only correct if we regard pre-emption as a right of re-purchase and not of substitution.

In support, however, of these views it is perfectly correct to insist on the fact that until payment is made there can be no right to enter into possession as owner, that is there can be no perfected title in the pre-emptor. Even when he gets his decree, he may not pay in the decretal amount or ever exercise his right of pre-emption on the terms it is decreed he may exercise it.

If, on the other hand, the substitution takes place from the date of the sale, it would appear that the vendee in the interval is logically a trespasser, and that, as we will see later, has not been the view taken by the Courts on any assumption.

It appears to me, however, that these cases, though apparently at first sight irreconcilable, are, in fact, not antagonistic, but merely view the matter from different standpoints.

The right of pre-emption we have already seen is a twofold right, *viz.*, a primary right existing before the sale, and a secondary right coming into operation the moment the sale is completed. In both of these rights there exists the right in the pre-emptor to avail himself of the bargain which is in derogation of his pre-emptive right. Even when the sale has been completed, it is still only a right *in posse* and it becomes a right *in esse* when the terms on which the right is enforceable are complied with.

That is to say the right becomes a perfected right when the decretal money or other terms of the decree are satisfied, but when the terms on which the right can be exercised have been satisfied, the right that is exercisable is the right as it was when it was infringed, that is to say, the right to take over the bargain as it was at the time of the sale, in place of the vendee.

In this view the rulings are not irreconcilable, the one set of rulings regard the nature of the right, the others the machinery which has to be put into motion to establish that right.

This appears to me to be the view expressed in the Full Bench ruling of P. R. 93 of 1902, and in the most recent Allahabad ruling XXXII All. 45, and is the view that, in my opinion, should be followed.

The result of this view would be that the pre-emptor will take over the bargain exactly as it stood when the vendee took it, neither more nor less, and any act done by the vendee interfering with the bargain would not affect the rights of the pre-emptor. On the other hand any act done by the vendee which did not relate to the subject matter of the bargain would be valid as against the pre-emptor.

This principle was followed in P. R. 22 of 1911 which held that it is the character of the property at the time of sale which has to be looked to.

In other words, the title of the vendee in the interval is not a full and complete title authorizing him to deal with the property as his own, nor is he a mere trespasser. His title appears to be a limited one, defeasible when the pre-emptor exercises his right of pre-emption, and any acts of his dealing with the subject matter of the bargain will not affect the pre-emptor or give anyone dealing with him a good derivative title as against the pre-emptor, but in so far as the property is dealt with, without affecting the subject matter of the bargain, the acts are valid.

This view appears to be further supported by the weight of authority which is to the effect that the vendee's *ad interim* title is a limited one, subject to a *quasi* servitude and liable to be defeated.

(i) S. D. A. N. W. P. Rep. 1865, p. 171 (N. W. P. H. C. R. 1866 Rev. App. 30).

The vendee's intermediate possession cannot be regarded as illegal.

(ii) VIII All. 502.

The original vendee cannot, whilst he is in possession, be regarded as a trespasser.

(iii) XX All. 100.

The stranger, on his purchasing a share from a co-sharer, obtains a vested interest in the share, and his interest, acquired by such purchase, can only be divested by voluntary sale by him or by decree in a suit.

(iv) XXVI All. 61.

A sale to which the right of pre-emption extends is not invalid: it is defeasible in the event of a co-sharer entitled to pre-empt electing to do so and paying the purchase money.

(v) P. R. 67 of 1881.

When land subject to the right of pre-emption is sold by the owner to a person not having the right of pre-emption, the interest of the vendor passes to the purchaser, but is liable to be again transferred to the pre-emptor upon his demand by suit.

(vi) P. R. 32 of 1884.

The sale by the vendee to the vendor is by no means a null and void transaction; on the contrary, it is a valid transaction as between him and the vendor and as against all other persons, including the pre-emptor, unless and until it is avoided by the latter. The pre-emptor has no title to immediate possession; he has no title to such possession until he has acquired the ownership from the vendee, and this he can only do upon payment of a sum yet to be ascertained.

(vii) P. R. 30 of 1893, Note

The purchaser is in the position of a *bond fide* holder under a defective title. The sale to him is a transaction voidable at the option of the pre-emptor. When the option is exercised, the sale as regards the original purchaser becomes void *ab initio*.

(viii) P. R. 93 of 1902.

The vendee has a limited title in him, a title limited by the right of the pre-emptor, but a title which the pre-emptor is not at liberty to ignore. A sale to a stranger is a transaction voidable at the pre-emptor's option, and consequently the pre-emptor alone has a title from the date of the sale.

(ix) P. R. 122 of 1907.

There is a defect of title in that the purchase is liable to be defeated at the suit of a pre-emptor.

Contra :—

IV B. L. R. 134.

A sale in respect of which pre-emption might be claimed passes full ownership to the vendee, and does not involve any defect of title, because it cannot be regarded as an infringement of any pre-existing pre-emptive right.

(d) We have now to apply the doctrine that the right of pre-emption is one of substitution, taking effect from the date of the sale when the decretal money is paid, to certain matters arising between the date of sale and the compliance with the terms of the decree by the pre-emptor.

These matters are four in number :—

- (1). Encumbrances created during the interval by the vendee.
- (2). Improvements effected during the interval by the vendee.
- (3). Profits accruing during the interval.
- (4). Deterioration caused by the vendee.

Bearing the principles enunciated above, there is really little difficulty in regard to these questions, though it must be stated that the rulings appear to be conflicting.

The conflicting nature of these rulings appears to me to be due to the omission to bear these principles in mind.

- (1) Encumbrances created during the interval by the vendee.

It appears to me to be beyond question that as the pre-emptor is entitled, on his satisfying the conditions of the decree, to take over the bargain as it stood at the date of sale, he cannot be held responsible for any encumbrances created thereafter, because they did not form part of the original bargain, and because such encumbrances are interferences with the nature of the bargain.

This view has been taken in the following cases :—

- (i) P. R. 68 of 1879.

Where the first vendee resells to a second vendee at a higher price the pre-emptor, who is entitled to follow the property into his hands, is not bound to compensate him. The compensation of the second purchaser is a matter to be settled between him and his vendor, and not between him and the pre-emptor.

(ii) P. R. 93 of 1902 F. B.

When the holder of a decree for pre-emption duly deposited the price into Court as directed, and obtained possession of the land in dispute, and, subsequent to the withdrawal of the money so paid in by the vendee, a suit was filed by a mortgagee for a declaration of his encumbrance made on the property by the vendee.

Held, (Clark, C.J., dissenting), as the effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of sale, the transaction being voidable at his option, the mortgage was not a valid charge against the land in the hands of the pre-emptor.

Robertson, J.—A pre-emptor who sues the first vendee and pays the money decreed is not bound to regard an encumbrance made on the land by the first vendee in favour of an encumbrancer not in possession, after he has paid the purchase money into Court.

When a successful suit for pre-emption has been brought and the purchase money paid into Court, a person, who alleges he holds a charge on the land created by the defeated purchaser, must look to the defeated purchaser for compensation and cannot enforce such a charge against the land in the hands of the successful pre-emptor, who has paid the purchase-money awarded into Court.

(iii) XXXII All. 45.

The vendee of property, which is subject to a right of pre-emption, cannot defeat the pre-emptive right by subsequently mortgaging the property, and thus force the pre-emptor to take the property subject to a mortgage so created.

(iv) P. W. R. 55 of 1912.

A pre-emptor is not bound to pay anything more than the amount fixed in a pre-emption decree as the price at which the sale took place, and he is not bound by a mortgage effected by the original vendee after the sale.

Contra :—

(i) Clark, C. J. in P. R. 93 of 1902.

I would hold that a charge on the land made by the vendee is binding on the pre-emptor to the extent of the price of the land he has been decreed to pay. The charge on the land being a valid one, binding on the pre-emptor, the next question is whether the pre-emptor has sufficiently discharged it by paying the price into Court. . . . It seems to me the pre-emptor, knowing of the charge, it lay on him to see the purchase money paid into Court was devoted to this purpose.

(2) Improvements effected by the vendee.

Following the same principles noted above this question also seems to me to be simple. The improvements made by the vendee were not the original subject matter of the bargain, and consequently the pre-emptor is not entitled to them. Moreover, under the Contract Act a person *bonâ fide* doing something for the benefit of another is entitled to recoupment.

Though, however, the pre-emptor is not entitled to the improvements, the question that remains is what is to be done with the improvements.

Each case depends upon its own merits, and the question of *bonâ fides* of the vendee making the improvements has to be considered.

He is entitled either to compensation for the value of the improvements or to removal of his material, and to decide which of these remedies should be given him, the circumstances of the particular case have to be looked to. Of course if the improvements are made after institution of suit, the doctrine of *lis pendens* applies.

Rulings to the effect that the pre-emptor is not entitled to the improvements, but that the vendee is entitled to one remedy or the other.

(i) P. R. 74 of 1875.

In the particular case where a well had been *bonâ fide* sunk by the vendee, held the property ought to be paid for by the pre-emptor as it stood after the well had been sunk.

(ii) P. R. 38 of 1889.

The general law is that the buildings do not go as of right with the soil, but whether the builder should merely be allowed to remove his materials or the owner of the soil, i. e., the successful pre-emptor, should take them over at a valuation or content himself with a ground rent, must depend upon the particular circumstances, more especially the conduct of the parties themselves in each particular case.

(For facts *vide infra*, p. 131.)

(iii) P. R. 91 of 1892.

The practice of the Court to award compensation for improvements to a vendee, who had made them in good faith or who appeared to be equitably entitled thereto, followed and affirmed.

(For facts *vide infra*, p. 131.)

(iv) P. R. 30 of 1893.

The original purchaser may be able to claim compensation for improvements effected during his occupation.

(v) P. R. 45 of 1895.

In case of additions to property the remedy of removal referred to incidentally.

(vi) P. R. 32 of 1899.

Improvements allowed for as a matter of course.

(vii) P. R. 93 of 1902.

A pre-emptor has to pay compensation for improvements made by the vendee on the principle that those improvements were not part of the bargain he is entitled to pre-empt.

(viii) P. R. 122 of 1907.

As a general rule a purchaser of immoveable property subject to the right of pre-emption, who has effected improvements in spite of the pre-emptor's warning him not to do so, is, under no circumstances, entitled to recover their market-value, but he might be allowed to remove them, if that can be done without injuring the property.

The right of a defendant to recover his outlay in improvements depends upon a rule of equity, the application of which varies with the facts of each case on which it is brought to bear. Strictly speaking, defendant is not entitled to be reimbursed for improvements which were not made in good faith. There is, however, another rule of equity under which any benefit that will accrue to plaintiff from defendant's expenditure should be paid for by the former, provided, of course, the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for plaintiff to pay for them.

Cf. also P. R. 22 of 1911, P. W. R. 78 of 1908 and P. W. R. 169 of 1912.

The following cases will show how these principles have been applied to particular circumstances.

(i) P. R. 38 of 1889.

Defendant bought on 24th June 1884, and plaintiff instituted his suit for pre-emption on 14th July 1884, having on the previous day issued written notice to defendant to refrain from building, and on 31st July 1884 he got an injunction issued against defendant.

On 26th August 1884 defendant applied to the Court for permission to complete his roof, stating the rest had already been built and permission was granted. These additions cost Rs. 107-11-6. On 25th November 1884 plaintiff's suit was dismissed, and the injunction came to an end. Then defendant completed his buildings at a total cost of Rs. 1,959. Plaintiffs appealed, but got no fresh injunction issued, but succeeded in their appeal on 15th March 1886.

Held, though the value of the site sued for was only Rs. 44, the plaintiff must pay for the value of the buildings, *i.e.*, Rs. 1,959.

(ii) P. R. 91 of 1892.

The facts were that plaintiff was away at the time of the sale, but, 20 or 25 days afterwards, he sent notice of his right to pre-empt and also later made an oral claim. The vendee replied asking plaintiff to say, by return, if he wished to buy for Rs. 300 (the sale price), so that he might stop building. Plaintiff replied immediately saying he would not pay more than the market-value and warned him to stop building; he took no further steps until the last day of limitation. Plaintiff's house adjoined the house in suit and he knew of the building going on, in fact allowed workmen to pass over his roof.

Held the vendee's action was no doubt of suspicious alacrity, and if plaintiff had followed up his notice by immediate action, I should have been disposed to disallow compensation, and it would have been no great hardship to compel defendant to remove the small additions then made by him, but plaintiff's laches were so great, he was remiss about suing, and so neglectful of his own interests that he is not entitled to any consideration.

The house was sold for Rs. 300, and the ultimate improvements which had to be paid for were assessed at Rs. 1,848-11-0.

(iii) P. R. 122 of 1907.

Where no claim is made for a long time, there may be an equity against compelling the purchaser not to improve his property on the mere chance of a claim for pre-emption being made, but here notice of a claim was given, without loss of time, on 12th November 1904 within 3 weeks of the sale, and again on 21st December 1904, the suit being brought on 16th January 1905. Plaintiff also applied for an injunction to stop building, and defendant was apparently reckless in pushing on his building operations.

Nevertheless, having regard to the equity that a person who derives benefit from another's act must compensate the latter therefor, Rs. 1,000 was allowed for improvements.

(iv) P. R. 22 of 1911.

Compensation for improvements disallowed when shown they were made in spite of a written protest by the pre-emptor.

(3) *Ad interim* profits.

Applying the same principles, as the *ad interim* profits are not the subject matter of the bargain as it originally stood, and as the vendee has a title above that of a trespasser, it follows that it is the vendee, and not the pre-emptor, who has the right to the *ad interim* profits until the decretal money is paid.

In addition to this conclusion being the logical one from the principles enunciated, it appears also to be equitable, for it would certainly not be equitable to allow the pre-emptor a return on his money before he had paid it; the vendor having parted with his property and received his price from the vendee would have no equitable claim, whereas the vendee who had *bonâ fide* invested his money in the purchase would appear to have an equitable claim to profits in default of some one with a better title.

The rulings, however, on the subject are not all of the same tenour, but the weight of authority is undoubtedly in favour of the view expressed above.

The rulings are :—

(a) That the vendee is entitled to the *ad interim* profits till the pre-emptor's title is perfected.

(i) N. W. P. H. C. R. 1866 Rev. App. 30.

We find it clearly laid down in Muhammadan Law that the original purchaser is entitled to hold the land or other subject of pre-emption, without rent or hire, while it remains in his hands, and, if he has sown land, the pre-emptor must wait for the ripening of the crops. In other words he is entitled to the enjoyment of it... The purchaser has in most instances paid the purchase money; is he to lose all his interest and profits, because at some subsequent time the contingency occurs that a pre-emptor claims and exercises his rights of pre-emption, and is the pre-emptor, who has kept his money in his pocket, till it suited his purpose to exercise his right, to obtain profit which will be the greater in proportion to his delay?

(ii) VIII All. 502.

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is entitled to take by substitution, but has

not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits which he can take only on duly making such payment.

(iii) XII All. 234.

The question is dealt with by the authorities on the Muhammadan Law of pre-emption as a matter relating to the deduction from the price, which the pre-emptor has to pay to the purchaser before enforcement of his pre-emptive right.

In the case A sued B, the vendee, for pre-emption and got a decree for possession. B then sued A for the profits of the property, which had been taken by A for the period between the sale and the decree. The decree in the pre-emption suit had been silent on the subject and no relief thereto had been sought.

Held (the finding being not on general principles, but on the interpretation of the decree) that the profits of the property, which accrued between the sale and the date when the pre-emptor, in accordance with the decree, paid the decreed pre-emptive price, belonged not to the pre-emptor, nor the original vendor, but to the original vendees, but, when the pre-emptor has paid the pre-emptive money, he becomes entitled to all subsequent profits, for to hold otherwise would be to encourage attempts to defeat decrees.

Mahmud, J. however, held that the original vendee was entitled to profits till possession was obtained, but this ruling appears to me to be opposed to the principles already laid down. He wrote —

The buyer during his possession, as such, is entitled to appropriate the profits accruing from the pre-emptional tenement, and if pre-emption is enforced against such buyer, the pre-emptor is not entitled to claim such profits for any period antecedent to the enforcement of his pre-emption. Therefore the vendees were entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree.

(iv) XIX All. 261.

A pre-emptor, who has obtained a decree for pre-emption in respect of a share in a pure zamindari village, cannot successfully maintain a suit against the judgment-debtor co-sharer for the profits of the pre-empted share accruing between the date of the original decree and the date of his obtaining mutation of names, such profits having been collected by the lambardar, but not paid over to the judgment-debtor.

(v) P. R. 30 of 1893, Note.

The original purchaser may be able to claim the value of the crops planted by him during his occupation of the land.

(vi) P. R. 93 of 1902.

It is the vendee, and not the pre-emptor, who takes the intervening profits.

(vii) Wilson's Digest, para. 389.

The vendee is entitled to retain any fruits gathered by him before the pre-emptor's title has been perfected, but not, according to the better opinion, fruits gathered in the interval, if any, between the pre-emptor's becoming entitled to possession under the terms of the decree and actually taking possession.

(viii) C. A. 338 of 1908.

In this case the Chief Court allowed stay of the pre-emptor's decree on defendant appellant giving security for mesne profits, and further held they could be recovered in execution proceedings.

(b) That the vendee must refund to the pre-emptor.

(i) II Cal. S. D. A. Rep. 85 (1813).

If A transfers to R by sale, and C afterwards comes forward and establishes his right of pre-emption, he will be entitled to the lands at the price paid for them by R who will be compelled to refund the profits accruing during the period of his possession to C, receiving himself the purchase money from A.

(ii) VII All. 674.

B purchased a share in a *mahal* on 3rd January 1880. A sued B and the vendor to pre-empt and obtained a decree on 24th March 1882. Subsequently B, as a co-sharer in the *mahal*, claimed from A, as *lambardar*, the profits of the share during the interval between the sale and the decree.

Held, there was no period of time during which B was properly in possession of the share and entitled to profits from A in his character of *lambardar*, but A must be presumed to have been in possession and entitled to the profits from the date of the sale.

The weight of authority is thus clear that the *ad interim* profits belong to the vendee, but the authorities are by no means unanimous on the question as to what date the right of the vendee to the *ad interim* profits terminates upon.

But it seems to me, if we apply the principles already given to the case, the pre-emptor can have no right to any *ad interim* profits until he has paid the decretal money.

Once he has done so he seems entitled to all subsequent profits accruing from the land, no matter when he may obtain possession under the decree. This rule has, however, to be read in the light of the rule of equity that anything done *bonâ fide* by one person for another must be compensated for by the other, and consequently it would follow (though there are no rulings directly in point) that crops due to sowings by the vendee, when the sowings were made before the institution of the suit, would belong to the vendee and not to the pre-emptor, even if the crops ripened after the payment of the decretal money.

But note, there are conflicting ruling as to whether the question of mesne profits is or is not one to be determined in execution of decree.

On the one side, we have C. A. 338 of 1908, *vide viii supra* and on the other C. A. 917 of 1909, where it was held that the recovery of intermediate profits between institution of suit and decree was one which could not be dealt with under section 244, C. C., but in a regular suit only.

The Judge deciding the two appeals is the same.

(4). Deterioration caused in the interval by the vendee.

The case-law on the subject is meagre, but there is no doubt that inasmuch as the pre-emptor is entitled to the bargain as it stood at the date of sale, he is entitled to be recouped for any deterioration in the bargain caused by an act of the vendor. Deterioration caused by "act of God" would, of course, not be one for which the vendee would have to make compensation.

The only published ruling on the subject is—

P. R. 92 of 1891. (*Obiter Dictum.*)

If the property has deteriorated in the hands of the purchaser I feel no doubt the pre-emptor might claim an abatement of the price.

(e). From the doctrine that the right of pre-emption is one of substitution, and that the right of the pre-emptor is to take the bargain as it stood at the time of sale three results naturally and logically follow, viz. :—

- (1) The pre-emptor must take over the whole bargain ;
- (2) The pre-emptor takes over all rights and obligations incident to the bargain ;
- (3) The vendor cannot retract from his sale when the pre-emptor comes forward.

We may, therefore, proceed to note the rulings under these heads.

(1) The pre-emptor must take over the whole bargain.

This is one of the oldest and most widely recognized principles of the law of pre-emption, but it is subject to certain limitations which will be noted hereafter.

The authorities for the view that the whole bargain must be pre-empted are :—

(i). II W. R. 285.

It is a fundamental principle of the law of pre-emption that the pre-emptor cannot break up the bargain of sale by suing only for a portion of the property conveyed by the sale.

(ii). VII W. R. 210.

The principle that a person claiming the right of pre-emption must take the bargain as it was made, or not at all, is recognized.

(iii). X W. R. 111.

The pre-emptor cannot break up the bargain of sale by suing only for a portion of the property conveyed by the sale.

(iv). XIV W. R. 469.

Plaintiff must take up the whole contract or give up his right of pre-emption.

(v). I All. 591.

Quotes VII W. R. 210 with approval.

(vi). V All. 180.

A pre-emptor, in enforcing pre-emption, must claim the whole subject of the bargain; he cannot divide the bargain by claiming only a portion of the property transferred.

(vii). VI All. 370.

Irrespective of the existence or non-existence of other pre-emptors, every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer.

(viii). VI All. 423.

Every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger, and a suit by a plaintiff pre-emptor, which does not include in its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right.

The omission to sue for the whole bargain amounts to acquiescence. It is a fundamental principle of the law of pre-emption that the pre-emptor cannot break up the bargain of sale by suing only for a portion of the property conveyed by the sale.

(ix). VI All. 455.

The general rule of pre-emption is that a suit for a portion of the property does not lie.

(x). VII All. 720.

There can be no doubt that every suit for pre-emption must necessarily include the whole of the property subject to the plaintiff's right of pre-emption conveyed by one bargain of sale to a stranger, and a suit which does not include in its scope the whole of such pre-emptional property is not maintainable.

(xi). VIII All. 462.

The principle of denying the right of pre-emption except as to the whole of the property sold is, that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee.

(xii). X All. 182.

The rule of law is that a pre-emptor must buy the whole and not part of the property which he is entitled to pre-empt.

(xiii). XI All. 108.

A pre-emptor must claim the whole of the property included in the sale transaction, and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property.....A pre-emptor cannot come into Court and claim only a portion when he is entitled to the whole.

(xiv). XIX All. 466.

Every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer.

(xv). XXX All. 130.

It is well-settled law in this Court that a pre-emptor must pre-empt the whole of the bargain between the vendor and vendee, or not at all. He cannot take a portion of it only.

(xvi). P. R. 11 of 1874.

A pre-emptor is bound to purchase all plots sold to which his right extends, or forego his claim altogether.

(xvii). P. R. 98 of 1876.

The pre-emptor, if he is to take over the bargain at all, must take it as a whole.

(xviii). P. R. 106 of 1880.

The right of pre-emption is a right to take over a sale bargain in its entirety.

(xix). P. R. 104 of 1882.

The subject-matter of a pre-emption suit, when the property sold is one and subject to the same right of pre-emption, is one and indivisible, and the suit must be either decreed or dismissed as a whole.

(xx). P. R. 10 of 1902. C. A. 1032 of 1906.

A pre-emptor is bound to take over a bargain in its entirety.

(xxi). P. R. 34 of 1903.

It is not permissible to take over only a portion of the original bargain.

(xxii). P. R. 83 of 1907.

The right of pre-emption attaches to the entire bargain to which the right applies, and a claim, whether joint or several, must be for the entire property to which the right applies.

(xxiii). P. R. 10 of 1909.

All property sold must be acquired by the pre-emptor, that is, the contract must be availed of and the substitution sought for to the fullest extent of the right.

(a). The rule applies to the following cases:—

(a). Cases where the pre-emptor is partly disentitled by his own acts.

(i). X All. 182.

Where two rival pre-emptors each obtained a decree under section 214, C.C. P., for a portion of the property, and it was provided that each pre-emptor should be entitled to the whole in case of default in payment of the pre-emption money for his part by the other, and both made default, whereupon one pre-emptor sought to obtain the portion allotted to the other on payment of a proportionate price, held, his claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole, and not part of the property which he is entitled to pre-empt.

(ii). XI All. 108.

The principle applies to the case of a pre-emptor disentitled by his own action or laches to maintain the claim as to a part. Such a disqualification pre-

vents the pre-emptor from maintaining his suit for any portion of the property included in the sale, even in a case where the claimant is ready to pay the price of the whole bargain in return for such portion as he is still entitled to maintain a claim for.

(β). Cases where other equally entitled pre-emptors sue.

(i). VI All. 370, *vide* (1) *viñ, supra* (p. 136).

(ii). VI All. 455.

The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption by suing for a portion of the property sold only.

(iii). X All. 182, *vide* (i), *supra* (p. 137).

Contra, however: —

XXI All. 292.

Where a pre-emptor by reason of the claim of other persons equally entitled with himself to claim pre-emption, is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it; he is not bound to frame his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to, having regard to the claims of other pre-emptors.

In the particular case five plaintiffs sued for five-sixths, and on for the whole, on the ground that the defendant had equal rights as themselves in one-sixth.

NOTE.—The decision appears to me to go further than the strict facts of the case warrant, for the dispute really was not in regard to preferential rights over the whole property, but only over part, and, as the defendant, and not a rival pre-emptor had equal rights in regard to a part, plaintiff had not preferential rights in regard to the whole, and their limitation to such part of the bargain as they had a superior right to was correct. In this view the decision is perfectly sound, but the extension of the doctrine is, I think, unsound, and, in view of the other authorities, it should be strictly limited to like circumstances.

(γ). Cases of compromise between the vendee and pre-emptor, whereby the pre-emptor accepts a part, when there is another claimant with rights superior to the vendee, even if his rights be inferior to those of the compromising pre-emptor.

(i). P. R. 106 of 1880.

If a person suffers another person to purchase and is content to accept a derivative title from him with respect to a portion only, he must be held to abide the consequences of losing even that portion, if another person, having a superior title to that of his vendor, claims to assert his right.

(ii). P. R. 34 of 1903.

Where a pre-emptor with superior rights agreed with a vendee, who was a stranger, that, in consideration of his receiving a portion of the property sold, he would waive his objections to the sale, held, it was not permissible by law so as to defeat the rights of other pre-emptors,

(d). Cases where the plaintiff is entitled to claim a portion of the bargain in respect to one statutory qualification and the rest in respect to another.

(i). II A. W. N. 79.

Where the plaintiff claimed one part of the property sold by virtue of the right of inheritance and another part by pre-emption, and his claim to a part by right of inheritance having failed, held, his suit for pre-emption must fail also, inasmuch as he had not sued for the whole bargain.

(ii). P. R. 10 of 1909.

A person, who, under the provisions of the Pre-emption Act, is entitled to pre-empt the entire bargain, that is, part under one clause of section 13, and the remainder under another clause, forfeits his rights altogether if he sues only for one portion.

(e). Cases where the would-be pre-emptor was himself a joint-owner and co-vendor in the sale.

The exclusion of one co-vendor from purchasing the share sold by the other vendor co-sharer is specially provided for in section 10, but the special reference was unnecessary as the prohibition follows from the doctrines that a pre-emptor must take over the whole bargain, and that a vendor cannot recede from his sale.

(b). The rule, however, is limited in the following cases :—

(a). It is limited to the extent of the pre-emptor's right.

Two sets of circumstances may arise in such cases, one where the pre-emptor has inferior rights in respect to a portion of the property sold, the other where he has equal rights in respect to such portion.

As, however, the right of pre-emption is a preferential right both sets of cases appear to be on the same footing. The decisions in the published cases are of two kinds, in one of which it has been laid down that the pre-emptor need not sue for such portion as he has no preferential right over, the other that he cannot. In the cases, however, where the judgment has been limited to an expression that he need not sue for more than he has a preferential right to, it has not been laid down that he can do so. There is only one case where it has been held that he can do so, though he need not, *viz.*, P. R. 64 of 1886, in which the facts are very peculiar, and this decision has been expressly overruled in P. R. 89 of 1905.

The decisions, therefore, to the effect that he need not sue for the whole bargain, must not be taken as meaning that he can do so, on the contrary, in view of the fact that the right of pre-emption is a preferential right and in view of the decisions, it must be taken that he cannot so sue.

The decisions are :—

(i) that he need not sue for such portion as he has no preferential right to.

(i). P. R. 107 of 1882 F. B.

Where a person is owner of several distinct properties, of which one is subject to a right of pre-emption, and he sells such properties in a single bargain to a person other than the pre-emptor, the latter is entitled when the right to pre-emption exists and the claim is made under Act IV of 1872, to bring a suit to enforce his right in respect of the property subject to his right alone, without suing to take over the whole bargain.

The principle, that the pre-emptor is bound to take over the whole of the bargain as settled by the vendor, is a principle which may be admitted to the extent that the pre-emptor cannot omit to claim any of the property comprised in the bargain to which his right of pre-emption extends, but it cannot, consistently with the provisions of Act IV of 1872, be held to oblige him to claim the whole of such property.

(ii). P. R. 44 of 1883.

Plaintiffs claimed two-thirds of four *khata*s sold in one single conveyance to three sets of people alleging that, though the plaintiffs and the vendees of the other one-third had equal rights of pre-emption, the other two sets were strangers and had no right against the plaintiffs, who were collaterals of the vendors.

Held, as plaintiffs had not rights of pre-emption over the whole land, they were justified in suing for that part of the land only to which their rights extended, and, as they had proved their preferential right and were not shown to have waived their rights or otherwise acted against good faith, they were entitled to succeed in regard the two-thirds.

(Note.—This case must be read subject to the qualifications under the heading "Specification of Interests," *quod vide* p. 98.)

(iii). XXI All. 292.

Where the defendant was entitled equally with the plaintiffs to pre-empt one-sixth, and the plaintiffs sued for five-sixths only, which represented their proportionate share, held, they need only sue for such five-sixths.

(iv). P. R. 90 of 1909.

Chevis, J. :—

A pre-emptor is not bound to claim the whole when his right of pre-emption extends only to a part.

(ii) that he cannot sue for such portion as he has no preferential right to.

(i). N. W. P. S. D. A. Rep. 1865, p. 173.

A pre-emptor is entitled to pre-empt only that part of the property sold to which his pre-emptive right extends.

(ii). N. W. P. H. C. R. 1875, p. 38.

When property is sold to co-sharers entitled to pre-empt a portion of the subject of the sale, the other co-sharers can maintain a pre-emption suit only in respect of so much of the sale as is liable to their preferential right of pre-emption.

(iii). VI All. 423.

If under one and the same deed of sale property subject to the right of pre-emption is sold along with other property not subject to the right, the plaintiff-pre-emptor cannot, *ex necessitate rei*, sue for the whole property conveyed by the sale, but only for so much as is subject to his pre-emptive right.

(iv). VII All. 720.

Before the rule that a pre-emptor must take over the whole bargain can be applied, it is necessary to determine whether he has any right of pre-emption in respect to each and every part of the whole.

(v). P. R. 87 of 1895.

It is now well established that a pre-emptor is not bound to claim the whole of a bargain, when his right of pre-emption extends over only a portion of the property sold, and, I think, it logically follows from this, that he cannot (where objection is taken) be allowed to claim any more of the whole bargain than that portion over which he can show a superior right.

(vi). P. R. 16 of 1905.

Was a case where plaintiff was only allowed to pre-empt a portion of the property sold over which his title to pre-empt was superior to that of the vendees.

(vii). P. R. 44 of 1900.

The plaintiff, where objection is taken, cannot be allowed to take any more of the whole bargain than that portion over which he can show a superior right.

(viii). P. R. 89 of 1905.

Where a bargain consisted of several distinct properties and the pre-emptor's preferential right extended only to a portion of such bargain, held, the pre-emptor is not entitled to take over the whole bargain, but only that portion over which he has a superior right.

P. R. 64 of 1886 dissented from.

(ix). P. R. 112 of 1907.

A bargain of distinct properties by a person having preferential rights only to a portion of such bargain, does not give him a right of pre-emption as regards the simultaneously purchased other portion. In such a case the pre-emptor, whose rights extend over only one lot, is not bound to take over the bargain in its entirety.

(x). P. R. 90 of 1909.

Rattigan, J. :—

I would add that the plaintiff is not compelled to sue for pre-emption of a house sold in a bargain to which he had no right to make a claim.

Contra:—

P. R. 64 of 1886.

In an appeal by the purchaser of certain land against a decree for pre-emption in respect of that land, it appeared that defendant had included in one sale land to which the plaintiff's right as a co-sharer was superior, with

land in which the purchaser had an equal right with the plaintiff, and it was contended that, as the plaintiff did not restrict his claims to those portions of the land to which his rights were superior, he must be regarded as on the same footing with the defendant-purchaser as to the whole of the purchase, both being alike proprietors of the village. It was not contended in either of the Courts below that plaintiff was bound to limit his claim to the holdings in which he was a co-sharer. Held, the defendant was not in a position to deny that as to the whole bargain the plaintiff's right was superior.

Per Barkley, J. :—

Because it was the act of the defendant to combine, in the same transaction land in which the plaintiff was a co-sharer with land in which he was not, and if the plaintiff was willing to take over the entire bargain, there was no reason why he should lose his superior right merely because he did not ask to have the transaction split up.

Per Plowden, J. :—

Because the defendant not having urged his objection in the first Court to the plaintiff taking the whole bargain by reason of his right extending only to a part, it was too late to take it on second appeal.

There is no difficulty in applying the rule except in regard to a large property where pre-emption is sought on the ground of contiguity. It has been held in P. R. 90 of 1909 F. B. by a majority that where, say, several houses are sold together, all within a ring fence, the pre-emptor's right extends only to the house immediately contiguous to his own, and not to houses contiguous to the contiguous house, but not contiguous to the pre-emptor's house. This ruling must, of course, be followed, but I entertain doubts as to its correctness, and it seems to me to be opposed to the doctrine that mere size of the property sold is no bar to the exercise of the right of pre-emption in regard to the whole.

(3). It is limited to cases where the vendor's title was undoubted, that is, the pre-emptor is not compelled to sue for such part of a bargain to convey which the vendor's title is doubtful.

P R. 102 of 1894.

A pre-emptor is not bound to claim such part of the bargain, the vendor's title to convey which is doubtful.

NOTE.—The correctness of this ruling appears to me to be open to doubt, except in cases where the property sold includes property really owned by the pre-emptor, for a pre-emptor in taking over a bargain takes over with it all risks of a defective title, *vide infra* "Obligations."

(7). It is limited in its application to one sale, that is, the pre-emptor need not sue for all sales made in respect to different shares in the same property sold at one time, but if he desires to do so he may sue for all.

(i). XIX All. 466.

A person entitled to a right of pre-emption is not bound to claim pre-emption in respect of all the sales which may be executed in regard to the property.

In the particular case A. transferred his interest in the property to B., and on the same day C., D., E., and others did the same under separate deeds.

(ii). XXXII All. 14.

Of the four owners of undivided shares in immoveable property three sold their interest, apparently at a later date, to the same vendee. A pre-emptor sued for pre-emption on the basis of both these transactions, impleading, as defendants, the vendors and a rival pre-emptor, as well as the vendee.

Held, that the suit was not bad for misjoinder of either causes of action or parties. Further, if there had been misjoinder, the Court should have amended the plaint and allowed the plaintiff to proceed with the claim in respect of one of the sales.

(iii). P. R. 28 of 1899.

Where certain vendors conveyed to the vendees their separate shares in one sale-deed, it being apparent that the sales were separate bargains, held, the plaintiff could bring a claim for pre-emption in respect to any one of the transactions contained in the sale-deed.

(δ). It is limited in cases where there is specification of interests between the stranger vendee and equally entitled vendee, that is, where a person entitled to pre-empt buys with a stranger, the pre-emptor cannot purchase by pre-emption the portion taken by the former, if there is specification.

(For meaning of Specification *vide* Definitions—Specification of Interests, p. 98.)

(i). VIII All. 462.

The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions and the reason of it does not exist where the shares sold are separately specified and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers.

(ii). XIX All. 148.

If the interest of the co-sharer vendee can be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed only as against the stranger, the rights of the co-sharer vendee being equal or preferential to those of the pre-emptor. If, however, the interest of the co-sharer vendee cannot be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed as against both.

But where the deed of sale does not contain specification, it appears the pre-emptor must sue for the whole.

VIII All. 462 and XIX All. 148, *supra*.

Compare, however :—

(i). VII All. 118.

If a co-sharer associates a stranger with him in a purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory on the pre-emptor to impeach the sale, so far as the co-sharer vendee is concerned.

(ii). P. R. 44 of 1883.

It was not considered obligatory on the pre-emptor to sue for the portion sold to the vendee with a right to pre-empt, unless it was held (a point not decided) that the vendee entitled to pre-empt had lost his right by joinder with stranger vendees.

These last two rulings would appear to give an option to the pre-emptor to sue for all or not as he likes. In neither was there specification, but the Punjab ruling has a guarded expression which it is difficult to understand, as the joinder of a co-sharer with a stranger in a joint and indivisible transaction, *ipso facto*, forfeits his power of resistance.

(c). The rule, that a pre-emptor must seek to pre-empt the whole bargain, is a strict rule, and, as we have seen, the omission to do so involves the forfeiture of the right (*vide supra* XIV W. R. 469, VI All. 423, VI All. 455, VII All. 720, XI All. 108, P. R. 104 of 1882, and P. R. 83 of 1907), (pp. 135 *et seq.*).

So strict is the rule that once the pre-emptor has filed his suit for a part of the bargain, he cannot be allowed to amend his plaint to claim for the whole bargain later, except where the error is a purely descriptive and inadvertent one.

(i). P. R. 10 of 1909.

Plaintiff was entitled to pre-empt the whole bargain, part under one clause of section 13, and the remainder under another, and he sued only for one part.

Held, that where, in spite of the defendant's objection to the contrary, the plaintiff persists in his suit as laid, he is not later entitled to amend his plaint.

(ii). II A. W. N. 79.

In this case plaintiff sued for part of a property by virtue of inheritance and for another part by virtue of a pre-emptive right. His suit failed on the ground of inheritance, and then he asked permission to amend his plaint so as to sue for the whole property by virtue of pre-emption.

The prayer for amendment was rejected.

The following rulings show that where the error is an inadvertent one and relates only to the description of the property, it is remediable by amendment :—

(i.) P. R. 7 of 1896, C. A. 483 of 1895.

Plaintiff sued to pre-empt, but the Divisional Court dismissed the claim on the ground that the sale included a share of the *shamilat*, which was not expressly mentioned in the plaint, holding that, as it was not expressly mentioned, the suit was not for the whole bargain.

The pleader for the plaintiff, however, stated he wanted the *shamilat* also.

The Divisional Court ruling was set aside, and amendment allowed, the Chief Court remarking, "It would have been justified only if the plaint or the pleader expressly excluded the *shamilat*."

(ii.) XVII All. 288.

Plaintiff in a suit, after filing his plaint, discovered the property in suit had been described by mistake as being of a slightly less area than it was in reality.

Held, amendment should be allowed, and that the misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold.

(iii.) XXXIII All. 616.

Where there was some doubt as to the exact share sold, and plaintiff had specified it in his plaint as 15 biswansis, where, as a matter of fact, it was 17 biswansis, held, the Court could allow amendment even after limitation for the suit had expired.

(2). The pre-emptor takes over all rights and obligations incident to the bargain.

This is a natural result from the doctrine that he takes over the whole bargain.

(i.) III All. 668.

A pre-emptor is entitled to all the benefits which the vendee takes under a contract of sale.

(ii.) V All. 180.

A pre-emptor is bound by the terms and incidents of the bargain if he succeeds in his pre-emptive claim.

(iii.) VI All. 423.

The pre-emptive right means the pre-emptor can substitute himself in the place of the purchaser, only by taking all the benefits as well as all the disadvantages of the sale in respect of which he chooses to pre-empt.

(iv.) VII All. 775 F. B.

The right is not free from definite qualifications, among which the most important is that the pre-emptor, complaining of the intrusion of the purchaser, should place himself absolutely in the position of the purchaser with reference to the terms of the contract, such as the amount and payment of the price, etc.

(v.) XXX All. 130.

A pre-emptor stands in the shoes of the vendee in respect of all rights and obligations arising from the sale under which he derived his title. A person who chooses to pre-empt must take upon himself the burden of the obligations subject to which the sale was made as well as the benefits accruing therefrom.

(vi). P. R. 69 of 1885.

The effect of a decree for pre-emption is merely to vest in the pre-emptor the rights which would have been acquired by the vendee. It would be useless and improper to attempt to define now against possible claimants what those rights are.

(vii). P. R. 102 of 1888.

Where a plaintiff obtains a decree for pre-emption on a mortgage he acquires the right to have the mortgage transferred to him subject to all the terms and conditions of the original transaction.

(viii). P. R. 46 of 1902.

A pre-emptor acquires all the rights and obligations arising from the sale under which he has derived his title.

(ix). P. R. 98 of 1906.

A pre-emptor, by reason of his pre-emptive right, is entitled not merely to have the sale transferred to him, but also to be vested with all the benefits which legally flow from the sale.

(a). He accordingly acquires the following rights:—

(a). A right to recover outstandings accorded to the vendee.

III All. 668.

Where a certain sum was fixed as the price of the property and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor, as part of the sale contract, that the vendee should recover for his own benefit certain monies due to the vendor at the time of the sale, and the vendee recovered such monies, held, the pre-emptor was entitled to deduct such from the original price fixed.

(β). A right to keep alive in his own favour, as against third persons, a mortgage favouring the vendee or one redeemed by him.

P. R. 67 of 1899.

One-half of certain land, the whole of which was at the time under mortgage to Z., was bought by A., who redeemed a prior mortgage over the said half in favour of X.

Subsequently B. got a pre-emption decree against A., and Z. then sued B. for possession as mortgagee without, however, offering to redeem the prior mortgage in favour of X.

Held, in the absence of evidence to the contrary, A., when he redeemed the first mortgage, must be presumed to have kept it alive for his own benefit, and that B., as pre-emptor from A., was entitled to all the rights of the original purchase, and held, therefore, that B. was entitled to use the said prior mortgage as a shield against the mortgage of Z.

(γ). A right to take over a mortgage in favour of the purchaser of an equity of redemption of the same property, when the purchaser has not kept the former expressly alive.

P. R. 98 of 1906.

The facts were that on 19th February 1903 a mortgage was made not redeemable for 32 years. On 2nd September 1903 the equity of redemption was sold to the same person. The vendee in his pleas had expressed no intention of keeping the interests separate.

Held, the pre-emptor could pre-empt both, and that the purchaser of an equity of redemption, who already held possession of the property in dispute under an unexpired mortgage could not, in the absence of clear proof of an express indication of an intention to preserve the charge on his own estate, set up against the pre-emptor his own previous mortgage as still subsisting.

(δ). A right to pre-empt subsequent sales.

P. R. 46 of 1902.

A successful pre-emptor is entitled to pre-emption in respect of a sale made after the sale he succeeds in, even though his pre-emption decree was passed after the subsequent sale was effected.

But he is not entitled to—

(a). the same terms and method of payment as were arranged between the vendor and vendee.

VIII All. 29.

A co-sharer sold part of his share in a village to a stranger. Only part of the purchase-money was paid in cash, the rest remaining on credit secured by two deeds, whereby the purchaser hypothecated the property bought to the vendor.

In a suit to pre-empt, held, the pre-emptor could not be said to have not only the right to buy, but also the right to be put in the same position, with reference to all the peculiar incidents of payment of the purchase-money as that arranged between the vendor and the vendee: he must pay the consideration-money in full.

(β). the benefits of personal covenants between the vendor and vendee.

C. A. 1032 of 1906.

A condition in the original deed of sale in which the vendor guarantees his title in the land solely to the original vendee and in which he agrees to compensate that vendee, if disturbed, is one which does not enure for the benefit of the pre-emptor who succeeds in obtaining a decree for possession by right of pre-emption. The pre-emptor is not entitled to the benefits of personal covenants between the vendor and vendee.

Such personal covenants, of course, are of avail in favour of the vendee against the vendor.

P. R. 111 of 1908.

The defendant sold to plaintiff a house which she had herself purchased a few months previously and covenanted for title, and further contracted that *agar koi digar dawadar paida hoga to mazhara zimewar hai*. Shortly after this, one A. brought a suit for pre-emption against the original vendee and the parties to the present suit, and obtained a decree for

possession. Plaintiff thereupon sued defendant to recover the loss sustained by him in the transaction.

Held, that the plaintiff was entitled to recover upon the covenants, not only the deficiencies between the price paid by him and the price decreed to be paid by the pre-emptor for the property, but also the costs incurred by him in defending such suit.

(b). He accordingly takes over the following obligations :—

(a). The risk of a defective title in the original vendor.

(i). P. R. 29 of 1888.

Refers to the possibility of the sale in question being upset later by the reversioners on the ground of want of necessity, and proceeds:—

All we decide is that, taking the sale for what it is worth, plaintiff is entitled to pre-emption.

(ii). C. A. 825 of 1900.

The son of a vendor can sue the pre-emptor for a declaration that the original sale was without necessity.

(iii). P. R. 76 of 1902.

The holder of a decree for pre-emption duly deposited the purchase-money in Court as directed. Subsequently, a reversioner of the vendor brought a suit to have it declared that the sale was without necessity and obtained a decree.

The pre-emptors then asked the Court for the return of their purchase-money, as they no longer wished to go on with the purchase.

Held, it would be most anomalous to allow the pre-emptor, after he has obtained his decree and paid in the purchase-money, to be allowed to change his mind suddenly and take back his money, and the fact that he has made a bad bargain and would have to pay off the reversioners, could make no difference to his legal position.

(iv). 7 All. 382.

Of any defect that has since turned out to exist in the title of the original vendors, not only the vendees but the pre-emptors must take the consequences.

This doctrine has been departed from in a somewhat peculiar case—P. R. 83 of 1911, and the ruling there given, even if correct, which I venture to doubt, should be strictly limited to the facts therein stated.

P. R. 83 of 1911.

A. sold land for Rs. 4,000. B. sued for pre-emption, alleging the real price paid was Rs. 3,000, and the Court gave a decree for the market value Rs. 3,240. A.'s heirs then sued for a declaration that the sale was not for necessity.

Held, though a pre-emptor who obtains a decree becomes, in many respects, identified in interest with the original vendee, he cannot be held a *particeps criminis* in a fraud perpetrated by the vendee, which he himself brought to light and succeeded in frustrating, and B. was not, therefore, debarred from urging in the present case that the sale, though ostensibly for Rs. 4,000, was, in fact, merely for Rs. 3,000.

(β). The liability to pay off the vendor's encumbrances.

XXX All. 130.

Property, the subject of a suit for pre-emption, was purchased by the vendees subject to an unregistered mortgage for Rs. 99. Held, the pre-emptor must

take the property subject to it, irrespective of the question whether he had notice of it or not.

(γ). The liability to pay off a mortgage redeemed by the vendee.

P. R. 43 of 1912.

A vendee paid the vendor Rs. 1,500 and paid off, under the terms of the sale, Rs. 2,000 to a mortgagee. Held, the pre-emptor cannot claim to pre-empt only the equity of redemption for Rs. 1,500, but must recognize the redemption as a valid act under the contract of sale, and restore the vendees to their original position by paying Rs. 3,500.

(δ). The liability to perform the purposes for which the sale was made.

(i). P. R. 157 of 1883.

The pre-emptor of an *adhlapī* tenure must undertake to carry out all the terms agreed to by the *adhlapīdar*.

(ii). P. R. 24 of 1901.

Where the *bona fide* intention of a vendor and a vendee was that certain land should be sold and bought for the purpose of the creation of a *dharmśāla*, and that the sale should be cancelled on failure to fulfil this condition, and the plaintiff as a pre-emptor claimed to purchase without fulfilling the condition, alleging that it was not intended to be enforced, and that he was not bound by the terms in the deed, held, that as there was nothing unusual or illegal in the arrangement, and that as the conditions were *bona fide*, the pre-emptor must abide by the terms of the deed, which had been offered and accepted by the vendee whom he wished to oust.

(iii). P. R. 33 of 1910.

P. R. 24 of 1901 approved of, but also held that when a plot of land is sold by a Jat Sikh to a Native Christian and the deed of sale states that it is purchased by the latter for the purpose of erecting a Christian church or school, without any stipulation for avoidance of the sale if no such building is erected, a pre-emptor can take over the bargain without agreeing to erect such a building and the principle laid down in 24 of 1901 does not apply to such a sale.

NOTE.—The principle appears to be, that when the performance of a particular act is one of the conditions on which the sale is made, the sale being cancellable if such purpose is not effected, or the object of the vendor and vendee in making the bargain is defeated when such purpose is not carried out, then the pre-emptor in order to succeed must undertake to carry out that purpose, but where the purpose of the purchase is one-sided, that is where it is only the intention of the vendee to do something with the property when he gets it, the sale as between him and the vendor being unaffected by the consideration whether he carries out his purpose or not, then the pre-emptor, in taking over the bargain, is not compelled to carry out the vendee's purpose.

This principle appears to be clear also in C. A. 738 of 1908, where it was held that the fact that agricultural land in a town was purchased for building purposes would not deprive a member of an agricultural tribe, entitled to pre-empt, of the right of pre-emption.

It should however be remembered that, though the right of pre-emption is one of substitution, a successful pre-emptor, holding a previous mortgage on the property pre-empted, can retain his mortgage and his purchase separate.

XXXII All. 1.

A prior mortgagee, who had in the exercise of a right of pre-emption purchased the property mortgaged to him, has a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee can bring such property to sale in execution of a decree on a mortgage held by the latter.

(3). The vendor cannot retract from his sale when the pre-emptor comes forward.

(i). P. R. 34 of 1870.

A vendor cannot refuse to sell to one whose right of pre-emption has been decreed.

(ii). P. R. 27 of 1874.

Under section 17, Punjab Laws Act, a vendor cannot retract after the pre-emptor has come forward and asserted his right; the vendor is bound to sell to him.

(iii). P. R. 62 of 1879.

When a sale is once complete it is no longer open to the parties to undo their completed act, so as to deprive a pre-emptor of his rights, and the fact that before a suit is brought the vendee resells to the vendor is no obstacle to the pre-emptor obtaining a decree under section 17, Punjab Laws Act.

(iv). P. R. 49 of 1881.

A seller cannot retract from his sale, even if by a claim for pre-emption the land passes to an objectionable rival or a personal enemy.

(v). P. R. 102 of 1888.

While a pre-emption suit on a mortgage was pending, the mortgagor substituted a simple bond for the same amount for the usufructuary mortgage deed on which the plaintiff was suing.

Held, the doctrine of *lis pendens* applied and the action of the mortgagor and mortgagee could not affect the pre-emptor.

(vi). P. R. 80 of 1888.

A vendor cannot retract from his sale.

(vii). C. A. 886 of 1902, C. A. 493 of 1908.

Where, before the institution of a suit for pre-emption, the vendee had resold the land to the vendor, and it was contended the resale was a bar to the suit, held, the contention was incorrect.

Contra :—

(i). P. R. 39 of 1867

A pre-emptor who has established his right in a court of law cannot force a sale to him, when both the vendor and vendee, after the decision, elect to recede from the bargain and cancel the sale, but he should get his costs.

(ii.) P. R. 4 of 1869.

In case of a mortgage subject to the right of pre-emption, held, when the pre-emptor comes forward, that liberty was reserved to the owners to decline to mortgage the land at all should they prefer this alternative to that of mortgaging to the pre-emptors.

It should be observed that this general rule has in one particular been expressly departed from in the Pre-emption Act. Section 25 proviso allows the Court to put a vendee, who has acquired property entirely or mainly in lieu of a debt greatly exceeding the market-value of the property, to his option either to accept the market-value fixed by the Court or to have the sale cancelled, and the vendor and vendee restored to their original position.

It should also be observed that this rule does not prevent a vendee parting with the property *ante litem* in favour of a person who has equal or superior rights to the pre-emptor and so defeating the case of the plaintiff.

C. It is a preferential right.

This is expressly provided for in section 4 of the Pre-emption Act, and it means that the plaintiff seeking to pre-empt must have not merely an equal right to buy as the vendee, but a superior right. If his right is merely equal to that of the vendee he is not entitled to pre-empt.

So, too, where there are rival pre-emptors, all with superior rights to the vendee but unequal rights as amongst themselves, the pre-emptor with the highest statutory qualification will obtain his decree, the others failing as against him, but in accordance with the rule laid down in Order XX, rule 14, C. C. P. getting, in order of preference, decrees against the vendor and vendee, subject to the decree granted in favour of the superior pre-emptor.

Where, however, the rival pre-emptors have equal rights *inter se*, all being superior to the vendee, they will obtain the property in accordance with the rules laid down in section 17 of the Pre-emption Act (*vide* Chapter VIII, Division among Pre-emptors).

The legislative provision in section 4 that the right is a preferential right reproduces the views to the same effect pronounced in the following rulings :—

P. R. 91 of 1875, 61 of 1876, 21 of 1908, 91 of 1909, VI W. R. 280, VII W. R. 260, IV Cal. 831, XV Cal. 224, A. W. N. 1886, p. 56, and several others.—
See also P. W. R. 179 of 1912.

It is a rule, also, recognized in the Muhammadan Law.

Before discussing the question as to the period when the preference must be held, it is necessary to consider the doctrine that the right of pre-emption is a personal right, as the rulings on the point are only understandable when that doctrine has been explained.

D. The right is a personal one.

No doctrine is better established than this, though the Pre-emption Act is silent on the point.

But, notwithstanding this fact, the greatest confusion seems to me to have arisen in applying the doctrine.

The reason is that while fully recognizing the doctrine, the doctrine has been stated in ambiguous terms.

For the sake of clearness I would state that the right of pre-emption is one belonging to an individual who possesses certain statutory qualifications under the Pre-emption Act.

Prior to the passing of the Pre-emption Act of 1905 the qualifications which the individual had to possess were customary ones, but that makes no difference to the description.

These statutory qualifications are those given in sections 14, 15 and 16 of the Pre-emption Act, (formerly sections 11, 12 and 13) and the confusion appears to me to have arisen by regarding and speaking of these qualifications as "incidents" to the right of pre-emption. They do not appear to me to be incidental in any way, but as qualifications bestowing the right of pre-emption on persons possessing them.

It is because one of the most important of these qualifications is the possession of certain immoveable property and that the right of pre-emption is exercisable only over immoveable property, that has added to the confusion in speaking of the right of pre-emption as attaching to the possession of immoveable property. In a sense that is right, but it seems to me only to render the subject ambiguous. If we start with what I consider is a clear exposition of the personal nature of the right of pre-emption, we will find many of the hitherto difficult points to be discussed hereafter perfectly clear and simple.

I would therefore again venture to lay down that the right of pre-emption is a personal right, belonging to persons who possess certain statutory qualifications, exercisable in respect of certain immoveable property.

Being a personal right, it naturally follows that it is not a right to or in immoveable property.

The following rulings show :—

(1)—that the right is a simple personal right.

V All. 180.

P. R. 136 of 1894, P. R. 139 of 1894, P. R. 95 of 1901, P. R. 94 of 1902, XXXVI Bom. 140.

(2)—that it is not a right attached to land.

VII All. 916.

(3)—that it is a *jus ad rem alienam acquirendam*, and not a *jus in re aliena*.—

(i). XXVI All. 61 F. B.

The right to pre-empt gives no vested interest in the property to the plaintiffs, but is merely a right of acquiring the property of which he might avail himself or not as he pleases.

(ii). 136 of 1894, 95 of 1901, 94 of 1902, 124 of 1907, 90 of 1909. Chatterji and Rattigan, J.J., and 91 of 1909, Rattigan, J.

(4)—that it is not a right to or in immoveable property.

(i). VIII W. R. 446.

The right of pre-emption is not an interest in property but a right to take the benefit of a contract between two other persons.

(ii). P. R. 136 of 1894.

The right of pre-emption is not a right to or in immoveable property. The subjection of village lands to the rights of pre-emption is a burden on the lands of every holder of the land, and restricts his freedom of transfer, but from this burden no right or interest in the land so subject arises in any other person.... A preferential right to acquire land belonging to another person upon the occasion of a transfer by the latter does not appear to me to be a right in or to that land.

If he exercises the pre-emptor's right between him and the owner, I think that it becomes more apparent that it is not a right to the land sold. A right to the offer of a thing about to be sold is not identical with a right to the thing itself.

(iii). P. R. 94 of 1902.

Quotes and follows P. R. 136 of 1894.

(iv). P. R. 90 of 1909, Chatterji, J.

What is affected by the existence of the right of pre-emption is not the right, title or interest of the owner of the property, but the exercise of his right of transfer.

Contra:—

(i). P. R. 37 of 1888.

A right of pre-emption is a right to or in immoveable property.
(Expressly overruled in P. R. 136 of 1894).

Being a personal right exercisable by virtue of the possession of certain statutory qualifications, and not a right to or in immoveable property it has been held :—

(1)—that a transfer of the right of pre-emption does not require registration.

P. R. 136 of 1894.

A sale of a right of pre-emption does not require registration.

Contra :—

P. R. 37 of 1888 (expressly overruled by 136 of 1894).

In a pre-emption suit defendant relied on an agreement by way of compromise, which, if admissible, was sufficient to prove waiver. It related to property worth Rs. 200 and was unregistered.

Held, as the property was worth Rs. 200, and the instrument purported or operated to extinguish a right in such property, it required registration and was inadmissible in evidence.

(2). The right is not transferable, so as to give the purchaser of property any right to pre-empt sales made prior to his acquisition of the right, both—

(a)—if the transfer be of the pre-emptive tenement subsequent to a sale of the pre-emptible tenement.

(i). VII All. 535 F. B.

Where there is a right of pre-emption which a shareholder could claim and enforce in respect of a sale of property a person, purchasing the said shareholder's interest in the village subsequently to the sale, cannot claim and enforce pre-emption as his vendor might have done.

(ii). P. R. 136 of 1894.

A right of pre-emption is an intransferable right, and cannot be created by contract between a pre-emptor and his assignee. Such a right cannot be sold so as to give the vendee the same right to pre-empt as the vendor had.

(iii). P. R. 95 of 1901.

Where a sale of one-half in five shops was made on 4th October 1898 and subsequently the owner of the other half transferred his one-half to his mother, and then jointly instituted a suit for pre-emption in respect of the sale. Held, the right of pre-emption being incapable of being assigned the mother had no right to sue, as the transfer of the property by gift to her could not confer on her any right to sue in respect of property which was sold before she had become owner of the property through which the right of pre-emption was claimed.

(iv). P. R. 94 of 1902.

Quotes and follows P. R. 136 of 1894.

(v). P. R. 133 of 1907 F. B.

The right to sue for pre-emption on a cause of action does not pass with the land if the land is alienated, because, in that case, a stranger might come in and so defeat the object of pre-emption.

(vi). XXXVI Bom. 140.

The right of pre-emption cannot be transferred to any one except the owner of the property affected thereby.

Contra :—

XX All. 148.

If a Hindu widow in possession of her husband's landed estate under a life interest has the power to pre-empt, and conveys the pre-emptive tenement absolutely to her daughter after the sale of the property pre-emptible, the right to pre-empt survives to the daughter.

(NOTE.—If this ruling be regarded simply as one where the right of inheritance in favour of the daughter was anticipated, it would not be in conflict with the above rulings).

(b) if the transfer be of a decree for pre-emption.

(i). S. A. 45 of 1883 (All.).

A decree for pre-emption being purely personal in its character cannot be transferred so as to entitle the purchaser to execute the decree.

(ii). VII All. 107.

The sale of a pre-emption decree does not give the vendee a right to obtain possession of the property by execution of the decree.

(iii). P. R. 94 of 1902.

The sale of a pre-emptional decree may be invalid, and the purchaser may not be entitled to execute it.

Contra :—

P. R. 78 of 1896.

A decree-holder holding a decree for pre-emption is entitled to transfer such decree and the transferee can execute for present possession, but such transfer will operate as a fresh sale of the property conferring a fresh cause of action on pre-emptors.

(Overruled in P. R. 94 of 1902).

(3). The right is lost to the pre-emptor if it be found that he is seeking the benefit of another person.

(i). P. R. 139 of 1894.

A suit by a person claiming pre-emption, the right being a personal one and exercisable only for his own benefit, must fail if it is proved he is seeking the benefit of it not for himself but for another.

A *benami* pre-emptor is an inadmissible notion and a pre-emptor cannot acquire for another.

(ii). P. R. 19 of 1898.

When it is proved that a plaintiff in a pre-emption suit is acting *benami*, the Court should refuse him a decree.

But—

(a) the fact that he is seeking the benefit of another must be very strictly proved.

(i). P. R. 139 of 1894.

A sold to B. C the best pre-emptor was apparently agreeable, and D the next best pre-emptor sued and got a decree. Then C sued.

C had no means of his own, his property was all heavily mortgaged to B, and his income was only Rs. 30 a month: he was almost certainly aware of the sale to B and he knew of D's suit and was probably willing for B to buy. Three weeks after D's suit he borrowed from B to deposit the purchase money without bond or security or promise to pay, so that it was clear the suit was instituted at B's instigation and probably for his benefit.

Held, that these facts only amounted to suspicion and not to certainty, and as the proof was not positive it could not be said that the suit was for B's benefit.

(ii). P. W. R. 78 of 1908.

The fact that a friend of the pre-emptor takes a keen personal interest in the case, and even pays the pre-emptive price into Court and gets possession of the property on the pre-emptor's behalf, does not show the pre-emptor has not sued for his own benefit.

(b). The fact that it is proved that the pre-emptor intends to resell on success is not proof of his seeking the benefit of another.

(i). P. R. 139 of 1894.

It is immaterial what a successful pre-emptor may do with the land he acquires subsequently. Any subsequent transfer would allow the next pre-emptor to assert his rights thereon.

(ii). P. R. 19 of 1898.

A plaintiff in a pre-emption suit is not disentitled to a decree merely because, in order to raise funds for the maintenance of his suit, he has entered into an agreement with other persons as to what he will do with the property if he gets it. Any subsequent transfer by the plaintiff, after he has obtained his decree, will give rise to a fresh cause of action to the other pre-emptors.

(iii). P. R. 10 of 1902.

A plaintiff in a pre-emption suit agreed with two strangers, after instituting a suit, to give them each a share of the property in case of a decree in his favour, on their paying a proportion of the costs and purchase-money.

Held, a pre-emptor was not incompetent to supplement his own funds by such an agreement, and was not thereby disqualified from maintaining the suit previously instituted by him, and that if, after obtaining the property he proceeded to transfer it, a fresh cause of action would arise to other pre-emptors.

(iv). P. R. 67 of 1907.

There is nothing which prevents a pre-emptor from enforcing his rights, because there is reason to suppose he does not intend to retain the property in his own hands after acquiring it.

(c). The motives which induce the pre-emptor to come forward and the source from which he derives his funds will not show that he is seeking the benefit of another.

(i). P. R. 87 of 1896.

The Court has no concern with the motives which may induce a plaintiff to claim pre-emption or with the source from which funds necessary to enforce the claim may be derived.

(ii). P. R. 19 of 1898, 10 of 1902, *vide (b) supra*, p. 156.

(iii). P. R. 7 of 1912.

The Courts are not concerned with the question where the pre-emptor is raising the money and what he is going to do with the land.

(iv). P. R. 58 of 1912.

The fact that the pre-emptor was instigated to prefer his claim by the vendees, who supplied him with the necessary funds on a mortgage of the land sold, apparently with the object of defeating another suit by a rival pre-emptor, does not prove he is acting *benami* for the vendees and therefore does not debar him from suing.

(d). The fact that the vendor and claimant live together is not proof that the pre-emptor is seeking the benefit of the vendor.

I All. 452.

The circumstance that a widow claiming pre-emption lived with the vendors would not deprive her of her right, it being found that the claim was not collusive.

(e). The fact that after decree the pre-emptor sells or mortgages the property to obtain the pre-emption money will not make it a case of seeking another's benefit.

(i). VII All. 107.

The holder of a decree enforcing a right of pre-emption, who, subsequently to the date of the decree and pending appeal, sells the property to a stranger, and permits the latter to pay the purchase-money decreed into Court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree.

(ii). XXIV All. 119.

The plaintiff in a pre-emption suit having obtained a decree for possession, in order to provide the means of paying the pre-emptive price, mortgaged the property, the subject of the suit, to a stranger. Held, that whatever rights the mortgage to a stranger might or might not give rise to in the future, the successful plaintiff did not by that transaction forfeit the fruits of his decree.

(iii). P. R. 7 of 1912, *vide (c) supra*.

(4). The right is lost, if, in anticipation of success, the pre-emptor has bargained with his right.

This doctrine, promulgated by the Allahabad Court, at first sight appears to be opposed to the Panjab rulings quoted in (3) above, which allow the pre-emptor to make agreements as to the disposal of the

property prior to the obtaining of his decree. The contradiction is however only apparent. The rulings of the Allahabad Court apply only to cases where the pre-emptor, before obtaining his decree, has actually transferred the right which he hopes to get, while the Punjab rulings relate to cases where the pre-emptor has made agreements as to what he will do with the property should he be successful. In the one case he has put himself in the position of only being able to fight out the case for the benefit of another, he retaining absolutely no personal interest in the result, in the other case, before he can carry out his intention of transferring to a third person, he must acquire the title in the property for himself, and so he is in the position of fighting out the case for his own benefit.

The Allahabad rulings are :—

(i). V All. 180.

A co-sharer who, under the *Wajib-ul-arz*, is entitled to pre-empt a mortgage, forfeits that right if he, in anticipation of obtaining the mortgage, mortgages such share to a stranger.

The right of pre-emption, being a personal privilege, cannot be made the subject of a sale or bargain of any other kind.

An attempt on the part of the pre-emptor to bargain with it is taken to indicate conclusively that the injury complained of is unreal, and that the claim is not dictated by *bona fide* motives.

NOTE.—

The judgment expressly limits itself to the actual property which is the subject of pre-emption and not other property, on which an opinion is indicated in accordance with the views of the Punjab Chief Court, holding that the source of the money in the pre-emptor's hands is no concern of the Court.

The judgment states: "To guard against being misunderstood, I may add that it is not necessary to consider whether the rule would have been different if the mortgage had related to property other than the one in respect of which pre-emption is claimed by the plaintiff in this suit."

(ii). VII All. 107.

We agree with the rule laid down in V All. 180 that, when a pre-emptor, in anticipation of the success of his pre-emptive claim, transfers the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption, such transfer operates as a forfeiture of the pre-emptive right, and the suit for pre-emption must, therefore, be dismissed.

Exception.—

Should, however, a pre-emptor, successful in *ex-parte* proceedings, then dispose of the property, he is not debarred from asserting his rights, when the *ex-parte* proceedings are set aside and the case re-opened.

P. R. 22 of 1887.

Where it appeared that the plaintiff's suit had been first decided *ex-parte* in his favour, and the Court had rejected an application for setting aside the *ex-parte* proceedings, whereon the plaintiff sold the land in question to a third party but the defendants, having thereafter appealed

successfully against the order refusing to set aside the *ex-parte* decree, and a rehearing of the case having commenced, they brought to the Court's notice the fact that plaintiff had sold the land at first decreed to him, and on this ground got the suit dismissed.

Held, on appeal, the order of dismissal was not maintainable, the plaintiff, having sold the land after it had become his own by the decree of the Court and after the decree had, as regards the first Court, become final, was at liberty to do then what he pleased and to make a profit, if he could, subject to the rights of pre-emption by others over the re-sale by himself and he was not thereby disqualified from maintaining the suit previously instituted when the enquiry into the claim had been reopened, and the decree which made him owner of the land had been set aside.

(5). The right of pre-emption is lost if a person entitled to pre-empt joins with himself a stranger or one with rights inferior to a subsequent claimant in the purchase.

The rule is subject to the modification hereafter noted.

The reason of the rule is simple, for, if a person entitled to pre-empt joins a stranger or inferior pre-emptor with him in a purchase, he, by that very act, defeats the object of pre-emption, viz., the exclusion of strangers and those with rights inferior to the vendee.

(i). P. R. 44 of 1883.

The possibility that the vendee entitled to pre-emption, by joining in a sale with others who had no such right, loses his right of pre-emption is referred to, but not definitely decided.

(ii). P. R. 10 of 1884.

Where it appeared one vendee, having a right of pre-emption superior to plaintiff's had joined in purchase with a person who had no such right, held, that the said purchaser could not be allowed to rely on his own right so as to defeat plaintiff's claim, but being a party to a transaction by which plaintiff's right of pre-emption was infringed, he was entitled to no superior position, when that right was asserted, to that of the other party who had joined with him in the purchase.

(iii). P. R. 83 of 1893.

Quotes P. R. 10 of 1884 with approval, and continues:—Where a person entitled to pre-empt buys along with a stranger, he purchases in violation of the rules regarding pre-emption and his act is incapable of being undone.

(iv). P. R. 102 of 1894.

When a purchase has been effected by pre-emptors and strangers combined, the mischief can only be remedied by setting aside the sale.

(v). P. R. 94 of 1895.

Where certain vendees, with rights of pre-emption equal to the plaintiffs' rights, associated with themselves certain other persons, whose rights

were inferior, in the purchase of an undivided share of a village, held, that, as the Punjab Laws Act recognizes no equal or superior rights in a pre-emptor joined with a stranger in a joint sale, plaintiffs' right of pre-emption was superior under the Act to that of the vendees collectively.

(vi) P. R. 102 of 1895.

Where it was urged that, standing by themselves, certain vendees were as good pre-emptors as the plaintiff, and that the suit ought to be dismissed on this ground, inasmuch as it was admitted that other co-vendees, who had no rights of pre-emption, purchased jointly with them, and that they alone were not the purchasers, this contention must fail.

(vii) P. R. 69 of 1898.

When a right of pre-emption is claimed against several purchasers the measure of their rights is to be taken to be that of the purchaser who has the lowest right, so that, if a claimant can show a right superior to that of any one of several joint purchasers, he must succeed.

(viii) P. R. 100 of 1900.

Where one brother, owning land by purchase in a village, joins in the purchase of other land a brother who has none, notwithstanding their father owns ancestral land in the village, he places himself in no better position than that held by the brother who has no land.

(ix) P. R. 48 of 1907.

If a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his right as to his share of the purchase.

(x). N. W. P. S. D. A. 1860, p. 53.

The sale of a share to a stranger jointly with a co-sharer renders forfeiture of the co-sharer's right of pre-emption.

(xi.) N. W. P. H. C. R. 1870, p. 343.

The sale of property to a stranger jointly with a co-sharer renders forfeiture of the co-sharer's right of pre-emption.

(xii) IV All. 252.

A co-sharer in an estate sold his share to R, also a co-sharer, and C and D, strangers, jointly and collectively. There was no specification of interests. Held, R must be regarded as a stranger in respect of the whole of the property sold by reason of his having associated himself with strangers' and he could not resist the claim of a pre-emptor even in respect of his own share.

(xiii) V All. 180.

The joining of a stranger by a co-sharer entitled to pre-empt in a sale extinguishes the right of pre-emption, entitling the other co-sharers to enforce pre-emption, which, but for such joining of the stranger, could not be enforced against the purchaser.

(xiv) V All. 197.

A pre-emptor buying with a stranger thereby loses his right of pre-emption.

(xv) VII All. 118.

If a co-sharer associates with him a stranger in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold.

(xvi) XVII All. 454.

Where a vendee, a Mohammedan co-sharer, joined with him in his bargain his nephew, who was not a co-sharer or a near relative of the vendor, held, a claimant with rights of pre-emption has the right to pre-empt the whole bargain.

(xvii) XIX All. 148.

When, in the purchase of immoveable property, in respect of which a right of pre-emption exists, a vendee, being a person entitled to purchase, joins with himself in the purchase a stranger, then, if the interest of the co-sharer-vendee cannot be separated from the interest of the stranger-vendee, the plaintiff can succeed as against both.

If there be no separation of share or interest in the sale-deed, then the co-sharer is no better off than the stranger.

Where a co-sharer chooses to associate with himself in the purchase a stranger to the village, and the sale-deed does not, on the face of it, disclose the particular share or interest purchased by the co-sharer-vendee on his own behalf, then the right of pre-emption can only be enforced by treating the co-sharer-vendee as if he were in the same position as the stranger in decreeing pre-emption against him. In such a case the bargain made between the vendees and the vendor is one joint in all its incidents.

(xviii). XIX All. 311.

In case of the joinder of a non-co-sharer as vendee the principles expounded in XIX All. 148 should be applied.

(xix). XV Cal. 224.

If a co-sharer in an estate alienates his interest to a co-sharer and a stranger, the purchasing sharer, by joining an outsider in the purchase, forfeits his rights as a sharer and another co-sharer has a right to pre-empt.

(xx). XXXIV All. 542.

The vendee in a suit for pre-emption having equal rights with the pre-emptor disables himself from resisting a suit for pre-emption, as much by associating with himself in a purchase another co-sharer whose rights are inferior to those of the pre-emptor as by associating with himself a stranger.

(xxi). P. W. R. 276 of 1912.

A vendee joining a stranger in the sale cannot claim a higher status than the stranger.

Contra :—

C. A. 660 of 1900.—Overruled in P. R. 48 of 1907.

The rule may be stated in another way, *viz.*, that, when a person with equal or superior pre-emptive rights to a subsequent claimant joins with himself in his purchase a stranger, or one with rights inferior to the subsequent claimant, the rights of the vendees, in comparison with those of

the claimant, shall be estimated to be those of the co-vendee with the lowest rights.

See *supra* P. R. 10 of 1884, 94 of 1895, 108 of 1895, 69 of 1898, 100 of 1900, and XIX All. 148.

Note, however, that two persons with different qualifications may join in the purchase—

P. W. R. 276 of 1912.

Where one of two rival pre-emptor is a member of an agricultural tribe, while the other is qualified under section II proviso, Act II of 1905, both are eligible to compete under section 12.

The principle, however, is limited to cases where the transaction is a joint and indivisible one. If the interests of the co-sharer-vendee and stranger-vendee are specified in the deed, the mere joinder of them in one deed will not operate to forfeit the co-sharer's interest, the reason being that there are two, and not one, bargains.

(i). VIII All. 462.

A co-sharer in a village conveyed by deed certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased, and the consideration paid by the co-sharer and the stranger-vendees, respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the Lower Appellate Court held that, although the co-sharer-vendees had a pre-emptive right of the same degree as the plaintiffs, nevertheless, they having joined a stranger with them in purchasing the property, had forfeited their right and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

Held, that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharer-vendees, who had an equal right to purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger-vendee were also exactly specified, the Lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

(ii). XIX All. 148.

When, in the purchase of immoveable property in respect of which a right of pre-emption exists, a vendee, being a person entitled to purchase, joins with himself in the purchase a stranger, then, in the event of a suit for pre-emption being brought, if the interest of the co-sharer-vendee can be separated from the interest of the stranger-vendee, the plaintiff-pre-emptor can succeed only against the stranger, the rights of the co-sharer-vendee being equal or preferential to those of the pre-emptor.

We think that the principle of law is correctly laid down in the passage "where the shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist.

The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated, and the rule should be so limited."

(iii). XIX All. 311.

In case of the joinder of a non-co-sharer as a vendee with a co-sharer, the principles expounded in XIX All. 148 should be applied.

It is interesting to note that there are no Punjab Rulings on this particular point, but, though XIX All. 148 takes a different view as to the meaning of "specification" to that taken in the Panjab, this principle of limitation is, I think, unimpeachable.

For definition of Specification, see Definitions—Specification of Interests. (P. 98).

(6). The right is not lost by a decree in another's favour to which suit the pre-emptor was not a party.

P. R. 139 of 1894.

The right to pre-empt being a personal privilege, it cannot be lost by a decree in another's favour to which he was not a party, so, where B has got a decree for pre-emption and A has a superior right and sues, it is not necessary to sue to set B's decree aside.

(7). Though the right is not transferable, it descends to the heir of the person who held it, if the heir possesses the same statutory capacity.

This rule is in opposition to the Mohammedan Law which so strictly interprets the personal nature of the right as to disentitle the heirs to exercise it.

The view given above is not only consistent with equity and the principles of pre-emption (as there can be no defeating the aims of pre-emption by allowing an heir to prosecute a suit), but it is in accordance with correct rules of jurisprudence, the heir simply representing the *persona* of the original pre-emptor.

(i). P. R. 98 of 1898.

Plaintiff in a pre-emption suit died *pendente lite*, and his sons were brought on the record and obtained a decree. On appeal the Divisional Judge *proprio motu* dismissed the suit on the ground that by Mohammedan Law, the death of a person who claims pre-emption causes abatement.

Held, under section 5, Panjab Laws Act, Mohammedan Law is inapplicable to a claim to pre-empt agricultural land, and a suit by a landowner to pre-empt village lands is not a merely personal action abating on his death,—the right survives to his representatives.

(ii) P. R. 133 of 1907.

A right to sue for pre-emption on a cause of action which accrued to a person in his life-time passes at his death to his successor, who inherits the property through which the right accrued.

(iii). XXVIII All. 424.

The successor by right of inheritance of a person, who had the right of pre-emption at the date of the sale, is not debarred from suing to enforce that right by the fact that his predecessor had not done so.

(iv). XXXI All. 623 F. B.

Where a right of pre-emption has once accrued, it does not of necessity lapse by the death of the pre-emptor before making a claim, but descends, along with the property in virtue of which it subsists, to the heir of the pre-emptor.

(v). XXXVI Bom. 144.

The right of pre-emption under Mohammadan Law does not abate at the pre-emptor's death, but survives to his executors and administrators.

Contra.—

(i). S. A. 1123 of 1904, All.

(ii). Banerji, J., in XXXI All. 623.

The right of pre-emption being a right of substitution, the heir of a pre-emptor, not having himself a right of pre-emption at the date of the sale, cannot maintain a suit.

(iii). XX All. 88 under Sunni Law.

According to Mohammedan Law applicable to the Sunni sect, if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption, the right to sue does not survive to his heirs.

(8). The right of a plaintiff-pre-emptor is not lost if, in a suit to enforce his right, he joins with him a stranger.

The mistake is one of procedure only and is remediable by amendment.

The view mentioned above is the one taken by the Chief Court and in some of the Allahabad Rulings, but the trend of the Allahabad Rulings, until recently, is to the effect that such a joinder is not a remediable error of procedure, but an act infringing the pre-emptive right of the same nature as is the joinder of a stranger with a pre-emptor in a purchase.

Punjab Courts must of course follow the Chief Court view.

The rulings are :—

(i). P. R. 49 of 1878—

Was a case in which only one of the plaintiffs was entitled to pre-empt, and a decree was given in his favour alone.

(ii). P. R. 83 of 1893.

A and B sued for pre-emption as being collaterals of the vendor. By the Divisional Court A was found not to be a collateral, and the suit was dismissed *in toto* on the ground that B, having joined a stranger with him, had thereby forfeited his own right to pre-emption.

The Chief Court held B was entitled to maintain the suit alone after A's name had been struck out.

The case differs from one where a person entitled to pre-empt buys along with a stranger; in this case the error is in the form of a claim made in Court, and not in violation of the principles of pre-emption, and can be remedied without infringing the right of any person.

(iii). P. R. 102 of 1894:

I think there is a very material distinction between the case of pre-emptive claimants joining strangers with them in a purchase, which the Court is asked to set aside, and the case of pre-emptive claimants allowing persons not entitled to join with them in suing, who retire from the suit when the mistake is discovered. The mistake in the latter case can be corrected by the authority of the Court duly exercised.

(iv). P. R. 94 of 1895.

A pre-emptor's right of pre-emption is not defeated if he joins with himself, as co-plaintiffs, strangers who have no right of pre-emption.

(v). P. R. 19 of 1898.

If persons other than those entitled to pre-emption join in a suit, the proper course is to object at the first hearing and have their names struck out, without altering the plaint generally or affecting the right of the remaining party to claim the whole property.

(vi). W. N. 1893, p. 25.

The mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption, but who have not qualified themselves according to Mohammedan Law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit, if he had sued alone, from maintaining a suit brought by him so far as he himself is concerned.

(vii). IV All. 259.

A co-sharer in an estate, who has a right of pre-emption does not, merely by joining with himself members of his family who were cousins but strangers *quoad* the estate in a suit to enforce such right, defeat such right.

The Lower Court had struck out the persons not entitled to pre-empt and given the co-sharer alone a decree.

(viii). VII All. 860.

If a co-sharer joins a widow, not entitled to pre-empt, in suing, he cannot succeed without amending his plaint, and such amendment cannot be effected in appeal.

(ix). XXXI All. 623 F. R.

The heir of a pre-emptor cannot be considered to be a stranger, as that term is generally understood in connection with a customary right of pre-emption, nor will his joinder with a co-sharer in a suit for pre-emption have the effect of defeating the right of his co-plaintiff.

Banerji, J :—

There is no legislative enactment or any other direct provision of law, which lays down that the association of a stranger in a suit with a pre-emptor entails a forfeiture of the right of the latter.

(Note.—It will be seen that, with the exception of the dictum of Banerji, J., in XXXI All. 623, the Allahabad Rulings which take the same view as the Punjab Chief Court are limited to cases where the "stranger" is a near relative).

Contra.—

(i). V All. 197.

A person entitled to pre-empt, who joins a stranger in a suit to enforce the right, forfeits his own right thereby.

(ii). XIX All. 148.

Where a co-sharer associates with himself, as a plaintiff, a stranger to the village in a suit in which he seeks to enforce pre-emption, he comes into Court asking that the custom shall be enforced against the defendants, although, in the very inception and maintenance of his suit, he is breaking the custom himself; and he mixes up his own rights as a co-sharer with those of strangers who could have no common right to pre-empt with him. The principle of law (rendering forfeiture) applies when a co-sharer seeking pre-emption associates with himself in the suit, as a plaintiff, a stranger to the village.

(iii). XIX All. 324.

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, that is, a person who has no such right, he thereby forfeits his right to pre-empt, and this disability cannot be overcome by amending the plaint and striking out the name of the stranger.

3. Having seen it established that the right of pre-emption is
 - a primary right existing antecedent to the sale which infringes it,
 - a personal right exercisable in virtue of the possession of certain statutory qualifications, and
 - a preferential right,

we may turn to a subject of great importance in which these three principles play a part, that is, to what period of time must we look to compare the rights of the plaintiff-pre-emptor and the vendee, or the subsequent assignee of the vendee.

On this point there is the greatest possible divergence of opinion.

All rulings are agreed that the pre-emptor must possess the pre-emptive right immediately before and at the time of sale, that is to say, that he must, at that time, possess the statutory qualifications necessary to enable him to seek pre-emption, and that those statutory qualifications must be of a superior nature to any which may be possessed by the vendee or his subsequent assignee. This follows naturally from the doctrine that the right of pre-emption is a primary right existing antecedent to the sale which infringes it, for there can be no infringement of a right which does not exist before it is infringed, and at the time it is infringed.

But at this point the agreement between the rulings ceases.

Some rulings hold that the pre-emptive right, in addition to being held just prior to, and at the time of sale, must be retained up to the date of institution of the suit, others up to the date of decree, others, again, until the pre-emption decree is perfected by payment of the purchase-money into Court and the acquisition of possession in accordance with the decree.

Some rulings hold that, whatever period may be selected as the one up to which the pre-emptive right must be retained, it is only lost if the pre-emptor loses his status by some act of his own, others that it may be lost by acts over which he has no control, as, for example, a change in the character of the property, and others again that the right to pre-empt is lost even where the pre-emptor retains exactly the same status as he had at the time of the sale if the vendee, by an act coincident with or subsequent to the sale, acquires a status as good as or superior to that of the pre-emptor.

If, in speaking of the authorities of the highest tribunals in the country, I may venture to say so, these contradictory views are due to the fact that there has been a confusion of the doctrine that the right of pre-emption is a preferential right with the doctrine that it is a personal right exercisable in virtue of the possession of certain statutory qualification. Though the two aspects of the right are interdependent one on the other there is a clear distinction between the two aspects, and it is the overlooking, or rather the emphasizing of one aspect at the expense of the other, that has led to the dissimilarity of views.

No doubt the question whether a plaintiff has a preferential right to a vendee means whether he has superior statutory qualifications, but it does not necessarily follow, so long as the plaintiff's statutory qualifications, which he possessed at the time of sale, are retained by him unimpaired, that his preference will be altered by some change in the comparative positions of the plaintiff and the vendee after the sale, that is to say, that the determination of the date of preference will not necessarily be the date for determination as to the final holding by the plaintiff of his statutory qualifications. Viewed from the opposite side, too, the same conclusion must be drawn, for, supposing at the time of sale the plaintiff and the vendee have equal statutory qualifications, the acquisition of better qualifications by the pre-emptor thereafter or a deterioration of the vendee's statutory qualifications subsequently, would not necessarily alter the date to which we would have to look to determine the comparative positions of the two. Put in another way, while it must be agreed that the plaintiff must have superior statutory qualifications when his right was infringed, and must retain his statutory qualifications, it does not follow his statutory qualifications must continue to be superior after infringement.

If we bear the fact in mind, therefore, that there is a distinction between the two aspects of the right of pre-emption mentioned, we will, I think, be able to deduce from these principles a definite and logical view on the question now under discussion, and I venture to think also that some measure of agreement between the views of the different rulings will

be deducible, for, as will be shown in the rulings, it frequently happens that the divergence of opinion is due to the insistence on one aspect of the right to the exclusion of the other.

The right of pre-emption being a primary right existing antecedent to the sale, it follows that the pre-emptor must possess his statutory qualifications before the sale and that those statutory qualifications must be superior to any possessed by the vendee or his subsequent assignee, that is, that prior to the sale and at the time of the sale, the plaintiff must possess the necessary personal right, and that that personal right must be preferential to the vendee's. It follows, also, that anyone who wishes to defeat the plaintiff pre-emptor must have been in possession of statutory qualifications both before and at the time of sale, and that those qualifications were preferential or equal to the pre-emptor's.

Consequently it naturally follows that no acquisition of statutory qualifications or a betterment of status by either the pre-emptor or the vendee, after the sale, can have any effect on the question at issue between parties.

I deduce, therefore, from this consideration that there is one date, and one date only, which we have to look to to enquire whether the plaintiff has a preferential right, *viz.*, the date of sale.

Once the preference is established as existing at the date of sale, it seems to me that we have no need to go further.

But it does not follow therefrom that the plaintiff—simply because he had a preference at the time of sale—can claim pre-emption, irrespective of all other considerations.

The right being a personal right enforceable by virtue of the possession of certain statutory qualifications, it follows that those statutory qualifications must be possessed throughout the proceedings to enforce that right, but it is not necessary that they should continue to be superior to any qualifications which may be acquired by the vendee.

That is, a person who, by virtue of owning property adjacent to the property sold, seeks to pre-empt that property must retain his ownership of the adjacent property until his claim has been adjudicated upon, but so long as he does so it is immaterial if the vendee, subsequent to the sale, has irrespective of the sale, acquired other equal or superior qualifications.

An interesting question arises here, *viz.*, whether the possession of the statutory qualifications are in any way affected by a change in the character of the property, *e. g.*, where a co-sharer seeks to pre-empt by virtue of being a co-sharer, is his right to pre-empt lost by the fact that, irrespective of any act of his own, the property is partitioned before decree? The authorities would seem to show that that amounts to a loss of the statutory

qualifications, but I greatly doubt the correctness of this view, for the reason that the statutory qualifications are unimpaired, and the only change is in the character of the bargain, and as we have already seen the right of pre-emption is a right to take over the bargain as it stood at the time of the sale, and not the bargain as it might subsequently become. I would, therefore, with due deference to the majority of the rulings on the subject, be inclined to lay down that the statutory qualifications cannot be affected by any change in the character of the property when such change has been independent of any act of the pre-emptor.

The right being a preferential right infringed by the actual sale, the cause of action is complete by the infringement, and it seems to me that that cause of action cannot, in any way, be affected by the acquisition later on of a status by the vendee, which had he possessed it just prior to, and at the time of, sale, would have afforded a complete answer to the plaintiff's claim. The preference, or, in other words, the comparative superiority of the plaintiff's statutory qualifications need exist only at one time, *viz.*, the time of sale, and no subsequent change in the betterment of either the pre-emptor's or vendee's position can affect matters.

There is nothing inconsistent, I think, in holding this view and in holding that the plaintiff must continue to retain his statutory qualifications (not necessarily superior throughout so long as they were superior at the time of sale) until he has given effective force to the right based thereon.

To hold, as has been done in some rulings, that a vendee can, by an act coincident with the sale, acquire equal rights with the sale is to ignore the fact that the pre-emptive right exists antecedent to the sale.

To hold, also, that the pre-emptor's preference can be affected by any subsequent acquisition of status by the vendee is to ignore the same principle and to ignore the fact that the preference exists, once and for all, at the time of sale and to confuse the essential distinction between having superior statutory qualifications at the time of sale and the retention of statutory qualifications in respect of which the plaintiff is claiming. It also opens the door to perpetual bidding between the pre-emptor and vendee, for, if the vendee can improve his position after sale, so, surely, can the pre-emptor, and the result would be that by when the decree stage was reached, an adjudication might be sought on relative positions not in existence at the time of sale.

To a more limited extent the same objection applies to the view that it is the date of institution of the suit which has to be looked to when we are determining the preference,

The rulings, however, which look to the date of institution seem to me to apply rather to the retention of statutory qualifications than to the retention of superior statutory qualifications or preference. In that view the rulings appear to me to be unimpeachable, but I do not feel sure if these rulings are read to mean that it is only necessary to retain the statutory qualifications till that date, that they are sound. As the possession of statutory qualifications is the necessary preliminary to the exercise of the right of pre-emption, it seems to me that they must be retained until the right is enforced by decree.

I have above noted that the comparison of preference has to be made between the vendee or his assignee with the pre-emptor, and at first sight this would seem to mean that a change in the vendee's position might alter the nature of preference, but in reality this is not so, for, if a vendee assigns *ante litem* to another who has equal or superior rights to the pre-emptor, he assigns to a person who was as good a pre-emptor as the claimant at the time of sale, that is, he conveys to another, independent of suit, in recognition of a superior pre-emptive title to his own.

I would therefore venture to lay down on this subject the following rules:—

a.—that the pre-emptor must have a preferential right, *i. e.*, be possessed of superior statutory qualifications immediately before and at the time of sale, and if he has such right at that time no one who acquires an equal or superior right by the sale, or after the sale, can defeat him. In other words, the preference has to be viewed with respect to the time of the sale alone.

b.—the right being a personal right exercisable in virtue of possessing certain statutory qualifications, it is necessary that those qualifications should be retained until the claim is effectively adjudicated upon.

c.—The possession of those statutory qualifications cannot be affected by any change in the character of the bargain not due to any act of the pre-emptor after sale.

I am aware that these views are not in their entirety supported by the authorities. For the majority of them there is good authority, but as the personal and preferential aspects of the right have almost invariably been dealt with as if they were one and the same, it is difficult to point out the rulings which support the view that the statutory qualifications must be retained throughout, and that the preference or superiority of those qualifications need exist only at the date of sale. As I have already stated, there are rulings which say that the nature of the pre-emptor's right has to be looked to at the date of sale, institution or decree, but

if the facts of the cases are looked to, it will be found that in the majority of cases, which hold that the right has to be looked to as at the time of sale, it is the preferential aspect that has been uppermost in the mind of the Courts, while, in the cases in which it has been held that it is a later date which has to be looked to it is the retention of the statutory qualifications which has been chiefly regarded.

I propose, therefore, now to group the rulings available, as far as possible, under headings appropriate with the views expressed above.

(a). The preferential right, that is, superior statutory qualifications, must be possessed by the pre-emptor immediately before and at the time of sale, and cannot be acquired by him subsequent to the sale.

(i). 11 All. 884.

Where a conditional sale took place in 1867, and after it had become absolute A sued to enforce his right of pre-emption thereon; basing his claim on a special agreement made in the interval between the date of the conditional sale and the date it became absolute, held, the suit was not maintainable, plaintiff having no right of pre-emption at the time of the conditional sale.

(ii). VII All. 107, *vide* p. 155.

(iii). VII All. 291.

Where a sale has been completed of a share, and subsequent thereto a third person acquires a share in the joint holding, he, not having been a co-sharer at the time of transfer, is not entitled to pre-emption.

(The facts of this case are interesting. On 1st September 1881 L and R agreed with B that in consideration of their bringing a suit to recover a 12-anna share in the village, which B claimed by right of inheritance against G, they would receive $\frac{1}{2}$ the share. L and R found the necessary funds and on 5th April 1882, on compromise, B got $1\frac{1}{4}$ annas out of the 12 claimed, and in the compromise B made over 1 anna to "L and R, my partners, in lieu of their expenditure".

On 3rd September 1881 G had sold 3 annas out of the 12 to one M, and on 3rd April 1883 M sued L and R to pre-empt the 1 anna share, alleging the transfer was effected by the compromise of 5th April 1882. The Court held the real transfer was on 1st September 1881 and, therefore, as M had become a co-sharer 2 days after, he was not entitled to pre-empt).

(iv). VII All. 535 F. B. *vide* p. 154.

The ruling proceeds :—

A person who is not entitled at the time of the sale to pre-empt does not become so entitled if he acquires, subsequent to the sale, a title which would have entitled him to pre-empt if he had held it at the time of the sale.

(v). XXXI All. 623, Banerji J :—

In the case of a pre-emptor who has acquired the pre-emptive tenement by purchase subsequently to the sale he cannot claim and enforce pre-emption as his vendor might have done.

(vi). S. A. 45 of 1883 All. *see* p. 155.

(vi). P. R. 95 of 1901.

Where a sale of $\frac{1}{2}$ share in five shops was made on 4th October 1898 and the owner of the other half subsequently gifted it to his mother, held, the latter was not entitled to sue, as she had no interest at the time of the sale.

(vii). P. R. 45 of 1906.

In a suit for pre-emption it was contended that the vendee had, by virtue of a gift made to him previously on the day of the sale by a proprietor of that village of a share in the common land, become a landowner within the meaning of section 12, Panjab Laws Act, and as such his rights were equal to those of the pre-emptor.

Held, the above contention was correct and must prevail as, in order to avoid a claim for pre-emption, it is neither illegal nor fraudulent for a person who desires to acquire a footing in the village to accept a gift of land from one of its proprietors previous to his purchase.

(ix). C. A. 40 of 1905.

In a suit for pre-emption by a co-sharer in a *khata* it appeared the vendee by reason of a gift of a small piece of land in the *khata*, had become a co-sharer therein a few days previous to suit. Held, the suit must be dismissed.

(x). P. R. 17 of 1908.

A plaintiff to succeed in a pre-emption suit must show he had a superior right at the date of sale and the subsequent acquisition of such right will not help him.

Compare also P. R. 7 of 1910, in which it was laid down that a member of a tribe not gazetted at the time of the sale as an agricultural tribe but subsequently so gazetted, could not pre-empt in respect of a sale made before the gazette notification.

This rule was, however, departed from in the statutory provision in the Act of 1905 creating a right of pre-emption in favour of persons who had no such right prior to the Act, and giving them the right to pre-empt sales made antecedent to the Act, though, here again, this provision is modified to bring it into consonance with the general rule of law, so that such a person cannot pre-empt an antecedent sale made to a person who, under the old law, had a superior right, but whose right has now become inferior.

(b). The preferential right once possessed by the plaintiff at the time of sale and immediately before it, cannot be affected by the acquisition of equal or superior rights by the vendee.

(a). by an act coincident with the sale.

P. R. 90 of 1909 F. B.

Where on the sale jointly of two houses which adjoin one another, the owner of a house which adjoins one sues for pre-emption in respect of the one of the two houses sold to which his right extends, the vendee is not entitled to say that by reason of his having, under the sale-deed, become owner of the other

house he stands on an equal footing with plaintiff, both being owners of the adjoining houses, and that the plaintiff cannot therefore pre-empt the house adjoining his own.

Chatterji, J. —

But this (*viz.* :—the doctrine that plaintiff may lose his rights by loss of his qualifications) is very different from saying that the pre-emptor may retain his rights intact, but may lose his suit nevertheless in consequence of the vendee improving his position to an equality with or a superiority over him, after his cause of action has accrued, and is sought to be enforced in Court.

I have great difficulty in understanding how his position can be changed for the worse by the vendee bettering himself by acts subsequent to the institution of the suit.

The rights to be adjudicated upon are those existing at the time of the accrual of the cause of action and no improvement of the vendee's position at a subsequent period can have any bearing on the points in issue.

Clark, C. J. :—

I think that a previous ownership is necessarily implied and that a person acquiring property simultaneously is in no better position than a person acquiring property subsequent to the pre-empted property. He cannot use a portion of the property acquired as a stepping stone to acquire the rest of the property by pre-emption.

Contra :—

Chevis, J. :—

The vendee may defeat plaintiff's right.

There seems to me ample authority for the proposition that a vendee may improve his position subsequent to the sale in question. That he can defeat plaintiff by placing himself on a level with the pre-emptor prior to the sale in question is admitted on all hands. Then if he can defeat a claim to pre-emption by improving his position, either just before or after the sale in question, why cannot he do so at the same moment as the sale in question and by the very same sale-deed.

Rattigan J. :—

I fail to see why (if a vendee can defeat a pre-emptor by acquiring equal or superior rights before and after the sale) he cannot put himself in such a position by buying that property simultaneously with the property in dispute.

Robertson, J. :—Concurred with Rattigan, J.

Reid, J., Kensington, J. and Shabdin, J. concurred with Clark, C. J. and Chatterji, J.

(ii). P. R. 112 of 1907.

In this case two houses were sold, plaintiff owning a house at one end, defendant a house at the other. Plaintiff sued to pre-empt the house next his own, defendant urged that, when he purchased the house adjoining his own, he acquired equal rights in the house adjoining plaintiff's thereby.

Held.—This is a proposition to which we cannot give our assent. It seems to us more than doubtful whether the argument is sound, whereby the defendant utilizes his purchase of one house as giving him a right of pre-emption as regards the simultaneously purchased house, in regard to which the moment before the sale he had no rights at all.

(β). by an act subsequent to the sale.

(i). XXXI All. 530.

Where a suit for pre-emption was dismissed for deficiency of Court-fees in both the Courts below, which decree was subsequently reversed by the High Court, and the case remanded and the vendee in the meantime acquired the status of a co-sharer, held the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of institution of the suit. Referring to XXI All. 441, the ruling states—

This case differs materially. In that case the plaintiff had lost his rights. In the present case the plaintiff's position is just the same as when he instituted his suit, it is the defendant vendee's position which has been altered.

(Note.—Though this case take the view that the preferences have to be adjudged as they stood at the date of institution, a view which will be shown to be incorrect, it is an authority for holding that acquisition of status by the vendee after the determining date, which is the date of sale, will not affect matters).

(ii). P. R. 90 of 1909 F. B.

Chatterji, J.—

I do not admit that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of the sale in dispute and the institution of the pre-emption suit.

Clark, C. J. :—

A defendant, however, cannot defeat the pre-emptor's subsisting cause of action by subsequently acquiring property which would have prevented the cause of action of the plaintiff pre-emptor arising, if it had been acquired before the sale.

Contra in this ruling.—

Chevis, J. :—

The vendee may defeat the plaintiff's claim by showing that he, the vendee, has, between the date of sale and institution of suit, improved his position and was at the date of suit in as good a position as the plaintiff.

There seems to me ample authority for the proposition that a vendee may improve his position subsequent to the sale in question and prior to the institution of suit, and so defeat a claim to pre-emption.

A vendee can resist a claim to pre-empt either by reason of a purchase prior to or one subsequent to the purchase in dispute.

Rattigan : J.—

There is good authority for the view that the vendee can defeat the pre-emptor's right by himself purchasing, subsequently to the date of the sale of the property in dispute, property from a person who, by virtue of such property, has an equal right of pre-emption.

(iii). P. R. 91 of 1909 Full Court.

In a suit for pre-emption based on the ground that at the date of sale the pre-emptor was a proprietor in the village, in which the property sold is situate and the vendee was not, the vendee cannot defeat plaintiff's claim by becoming a proprietor in the village, whether by gift or otherwise, after the date of the institution of the suit but before the passing of the pre-emption decree.

(Note.—The head note in this case confines itself to the particular question before the Court; *viz.*, whether an acquisition of status between institution and decree would affect the pre-emptor's right, but, viewed in conjunction with 90 of 1909 and the expression of opinion of certain of the Judges, the same rule is applicable under this ruling to acquisition of status between sale and institution).

Clark, C. J :—

In 90 of 1909 I held that a vendee could not, by a contemporaneous purchase, defeat the rights of a pre-emptor, and it follows *a fortiori* that he cannot defeat them by a subsequent purchase, whether prior or subsequent to the institution of the suit.

Reid, J :—

I am unable to hold that, because the pre-emptor's position may deteriorate, the purchaser's position may improve after the purchase without any independent deterioration of the pre-emptor's position.

Kensington, J :—

I am in favour of holding that a vendee cannot improve his position so as to defeat a right of pre-emption against him by anything which he does subsequently to the date of sale.

Shahdin, J :—

It is not in my opinion correct to say because a pre-emptor may, in certain contingencies, lose his right of pre-emption after the institution of the suit, that therefore he must lose that right if the vendee, at any time before the decree, improves his position by becoming owner of other property, the ownership of which before the date of sale would have enabled him to enjoy an equal right of purchase with the pre-emptor.

I fail to understand how the vendee, who at the time of sale had not a right of equal purchase with the pre-emptor, can at all place himself on a footing of equality with the latter by reason of acquiring any property after the date of sale. If, after the sale, the vendee acquires other property, whether before or after the institution of the suit for pre-emption against him, surely such acquisition cannot relate back to the time when the sale of the property in dispute was made in his favour, and he cannot be rightly considered, by reason of such subsequent acquisition, to have acquired a right of equal purchase with the pre-emptor *qua* the property sold to him in violation of the latter's right.

It does not follow (from the proposition that a pre-emptor may lose his right by deterioration of status) that the vendee can, independently of any deterioration of the pre-emptor's position, improve his own *qua* the property in suit by acquiring other property between the date of the sale in question and the date of the decree in the pre-emptor's favour.

Contra in this ruling.—

Rattigan, J :—

If it be admitted, as it is, that the pre-emptor's right to a decree fails, if he has lost his position at any time prior to the date of decree, owing to his property having been transferred by him or to the property in suit having been transferred to one who has rights equal to his own, the logical inference would certainly seem to be that he no less effectually loses his right if, at any time prior to the passing of the decree, the vendee can, on any other ground, satisfy the Court that the plaintiff's rights are in no whit superior to his own, and that *qua* the property claimed he is no more a stranger than the plaintiff.

Robertson, J:—

It appears to me that when once we have granted that a plaintiff in a pre-emption suit can lose his right by the deterioration of his own right, we are committed to the view that he can also lose it by the appreciation of the defendant's right.

Contra.—

(i). P. R. 24 of 1907.

A person who was, at the date of sale, a co-sharer in the land cannot claim pre-emption in respect of a sale of land as against the vendee, who at the date of sale was not a co-sharer therein but became a co-sharer before plaintiff instituted his suit. I do not wish it to be inferred that a plaintiff's right to claim pre-emption would be defeated by the vendee acquiring the status of a co-sharer during the case. The doctrine of *lis pendens* might apply to such a case.

(Expressly dissented from in P. R. 91 of 1909).

(ii). XXV All. 421.

If a stranger purchases a share in a village in respect of which a right of pre-emption subsists in favour of co-sharers, but subsequent to such purchase and before any suit for pre-emption is brought in respect of such share, he becomes himself, apart altogether from the purchase in dispute, a co-sharer in the village, he cannot be ousted by any co-sharer not having superior rights of pre-emption to himself.

(iii). XXVI All. 359.

After an alleged cause of action for pre-emption had arisen, but before suit had been brought, the defendant-vendees acquired, by dismissal of another suit for pre-emption brought against them by two of the plaintiffs (the dismissal being due to failure to file the pre-emption-money) on a different cause of action, a title as co-sharers in the village in which the property sought to be pre-empted lay, held that the title so acquired was a good answer to the subsequent suit for pre-emption.

(Note.—If the sale which the plaintiffs failed to set aside was made before the sale in this suit, then this decision is not opposed to 90 and 91 of 1909. If however it was subsequent the ruling must be regarded as *contra*).

(iv). C. A. 736 of 1910.

In this case A and B co-sharers sold their shares. C got a consent decree passed in his favour *re* A's share and so became a co-sharer. Then D and C sued to pre-empt B's share, D as an heir, C as co-sharer.

Held, that as, before institution of the suit, C had become a co-sharer he had superior rights.

(c). The sole period for comparing the statutory qualifications of the pre-emptor and the vendee, *i.e.*, which of them has a preferential right, is the time the sale took place.

This naturally follows from the last proposition, inasmuch as no change in the vendee's situation can alter the comparison later. It is of course subject to the proviso that the pre-emptor continues to keep his statutory qualifications.

The rule besides being deducible from (b) is emphasised in the following rulings :—

(1). The sole time to look at is the date of sale :—

(2). P. R. 90 of 1909.

Chatterji J :—

The rights to be adjudicated upon are those existing at the time of the accrual of the cause of action.

Clark, C. J :—

I do not think that the defendant-vendee can defeat the plaintiff if he can show that, at the institution of the suit, irrespective of the right at the time of sale, the plaintiff has no right of pre-emption over him.

Reid, J :—

I am unable to hold that any distinction can be drawn between the position of the purchaser at the date of sale, at the date of suit, and at the date of decree. His position at the date of sale governs the decision.

Kensington, J :—

It does not seem to me to be good law to examine the pre-emptor's position from any other standpoint than that which he was entitled to take up at the time of sale.

Shah Din, J :—

It is a wrong application of the law of pre-emption to hold that the pre-emptor is bound to show that he had a preferential right of purchase as against the vendee not only at the time of the institution of his suit. The question of priority, as between the pre-emptor and vendee, must be decided in advertence to the state of things existing at the time of sale, and not at any later period, and also with special reference to the rights possessed by the pre-emptor and the vendee, respectively, against the vendor, and to the vendor's obligation to offer the property in dispute to one of them in preference to the other before a sale actually takes place.

(ii). P. R. 91 of 1909.

Clark, C. J :—

It is argued for the vendee that a long course of decisions has established that it is not sufficient to look to the plaintiff-pre-emptor's right as it existed at the time of sale, but that his superior right of pre-emption at the time of decree must also be made out, and that it follows from this that his right at the time of decree must invariably be superior to the vendee's.

It is a long step from the contention (that a pre-emptor may lose his pre-emptive right by loss of statutory qualifications) to infer that the only question is the comparative right of the pre-emptor and the vendee at the time of the decree. The principle does not apply to the case of a vendee who only acquires his pre-emptive right after the sale.

Kensington, J :—

We have a perfectly clear position if we look to the date of sale, and that alone, as determining the rights of parties.

Shah Din, J :—

In comparing the rights *inter se* of the pre-emptor and the vendee in regard to the sale in dispute the point of time to be regarded is the date when the sale in question took place and not any later date.

The simplest and the soundest principle to apply in case of disputed pre-emption, such as the one before us, is to look to the state of things existing at the time of the sale in question, and to compare the rights of purchase *qua* the property in suit possessed by the pre-emptor and the vendee or the transferee from the vendee at that time.

Cf. also P. R. 22 of 1911.

(2). It has been held in the following that the date of institution of suit is the date to look to.

(i). W. N. (All.) 1899, p. 127.

In order to successfully maintain a pre-emption suit, it is essential not only that a cause of action should arise to plaintiff at the time of the sale, which is the basis of the suit, but that it should subsist at the time the suit is brought.

(NOTE.—This case was one where the pre-emptor had lost his statutory qualifications).

(ii). XXVI All. 389.

In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise at the time of the sale, but that such cause of action should subsist at the time when the suit is brought.

(NOTE.—This was a case in which the vendee had, prior to sale, acquired an equal right, but it was only adjudicated on subsequent to the sale).

(iii). XXXI All. 530.

With the exception of the observations in XXI All. 441, the decisions all seem to show that it has been the opinion of this Court that the date of the institution of the suit was the crucial date.

(NOTE.—In this case there was no contest between the date of sale and that of institution, but between the date of institution and date of decree, and as will be seen under (d), p. 179 *et seq*, the Allahabad rulings are all concerned with the question of loss of statutory qualification by the plaintiff after sale.)

(iv) C. A. 461 of 1900.

The right of pre-emption should subsist not only at the time of sale of a property but also at the time of institution of suit.

(NOTE.—This also was a case where the plaintiff had lost his statutory qualifications after suit.)

(v). P. R. 124 of 1907.

What the Courts have to look to is the question whether at the date of the institution of the suit as well as at the date of the sale, the plaintiff has preferential rights compared with the rights of the defendant in possession of the land.

(NOTE.—This too was a case where the pre-emptor had lost his statutory qualification after sale.)

(vi). P. R. 90 of 1909.

Chevis, J :—

The plaintiff to succeed must have a right to pre-empt—existing both at the time of sale and also at time of suit.

In my opinion the correct way of stating the matter would be that the plaintiff must prove a superiority existing from the moment prior to sale to the time of institution.

Rattigan, J :—

There are a number of authorities to the effect that a pre-emptor must show that he has a cause of action, or, in other words, a preferential right of purchase not only at the date of the sale of the property in dispute, but also at the time of the institution of the suit.

(vii). P. R. 91 of 1909.

Robertson, J :—

I think the basis of decision in a pre-emption suit should be the relative strength of the rights of pre-emption at the date of suit. I do not think it necessary to go beyond that.

(viii). P. R. 7 of 1910.

In pre-emption cases a plaintiff must show that at date of sale and also at date of institution of suit he had a right of pre-emption superior to that of the vendee.

(3). It has been held in the following that the date of decree is the date to look to.

P. R. 91 of 1909.

Rattigan, J. :—

In my opinion it is essential for a claimant for pre-emption to show that he possesses the right to which he lays claim up to the date of decree.

To my mind what the Court has to look to before it gives one man the right to deprive another of the just results of his contract, is whether the former is at the time of its decision in a better legal position *qua* the property claimed than the person to whom that property has been legally transferred.

Contra :—

XXIV All. 119 and VII All. 107, *vide* p. 157.

(d). The pre-emptor must retain his statutory qualifications unimpaired until he gets his decree.

That he must retain his statutory qualifications after sale is conceded by the great majority of rulings, but the authorities who agree to that proposition are at variance as to whether he must retain them to institution of suit or to date of decree. It seems to me that the difficulty has arisen from overlooking the distinction between the necessity of retention of statutory qualifications and the continuation of superior

statutory qualifications, which, as we have seen, it is only necessary to have up to the date of sale.

I confess that once granted that the statutory qualifications must be maintained after sale, I fail to see why it is not incumbent that they should be retained until the decree.

My own view is that they must be retained up to the end and I propose to give the authorities under three heads:—

(1) That the statutory qualifications must be retained until decree.

(i). P. R. 49 of 1901.

Where a pre-emptor sued to pre-empt a dwelling house on the ground of vicinage, but before obtaining a decree divested himself by gift of the proprietary right in the house, the title to which gave him the right to sue.

Held, it would be inequitable to decree his claim, as a decree in his favour would not confer on him the benefit for securing which the right of pre-emption exists, viz., the enjoyment of his own property without molestation from undesirable neighbours.

(ii). P. R. 90 of 1909 F. B.

Chatterji, J :—

A pre-emptor is bound to show that he was clothed with the right at the date of sale, and also at that of suit, and up to the time of the final decree, or should have his claim dismissed. If the pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control, his suit fails.

The pre-emptor cannot get a decree unless he maintains he right on which he sues to the end.

The rights have to be adjudicated upon...subject only to the plaintiff being required to show that he is still possessed of the rights on the infringement of which his suit is based.

Clark, C. J :—

Conceding that the plaintiff-pre-emptor must retain the prior right up to the time of institution of suit, and even up to decree.....A plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action and if he loses that property, either voluntarily or involuntarily before decree, his suit must fail.

(iii). P. R. of 1909.

Clark, C. J :—

It may be conceded that where the plaintiff at the time of decree no longer possesses a right of pre-emption, he has lost his right of pre-emption. The principle on which this rule is based is that it would defeat the object of the law of pre-emption, if a pre-emptor were allowed to pre-empt when he, at the time of the decree, no longer possessed the qualifications, which entitled him to pre-empt.

Rattigan, J:—

It is clear that a pre-emptor, who has an undoubted cause of action at the time of the institution of the suit, can lose his right to a decree, even after the institution of the suit, if he himself parts with the property by reason of which he claimed pre-emption.

(iv). XXI All. 441.

Where a plaintiff who had filed a suit for pre-emption lost, during the pendency of a suit, the right to pre-empt, held the plaintiff's suit for pre-emption should be dismissed.

(v). XXXII All. 567.

In a pre-emption suit by a plaintiff claiming as a co-sharer it appeared that, after suit but before decree, the property was partitioned. *Held*, plaintiff was no longer, after the partition had been completed, entitled to a decree.

(vi). P. R. 67 of 1912.

A pre-emptor can only succeed if he has a right of pre-emption at the date of the sale and at the date of the institution of suit and up to the passing of a decree in his favour.

(2). That the qualifications must be retained by the pre-emptor, at any rate, until the institution of suit.

C. A. 461 of 1900.

(i). Partition of joint property, prior to the institution of suit, defeats the right which the pre-emptor otherwise has under section 12, clause (a), Punjab Laws Act, that clause being inapplicable after partition.

(ii). P. R. 95 of 1901.

A co-sharer, who parts with his ownership before suit, loses his rights with the loss of ownership by transfer.

Where a sale of one-half share in five shops was made on 4th October 1898, and subsequently the owner of the other one-half gifted his one-half to his mother, and then sued jointly with his mother for pre-emption in respect of such sale, *held*, the son was incompetent to sue, as he had parted with his ownership before the suit, his rights being lost with the loss of the ownership.

(iii). P. R. 32 of 1902.

It is essential that the cause of action should not only arise at sale, but also subsist at the time of institution of suit.

The pre-emptive right of a co-sharer of land in a joint holding does not subsist after partition at the application of the vendee.

(iv). P. R. 44 of 1903.

The pre-emptor loses his right to pre-empt if he parts with his pre-emptive property before suit.

(v). P. R. 124 of 1907.

A pre-emptor who, before he institutes a suit for the purpose of establishing his right of pre-emption, has lost his pre-emptive right, either by some act

of his own or by other circumstances quite unconnected with any voluntary act on his part, cannot claim his preferential right.

(vi). P. R. 90 of 1909.

Chevis, J:—

The vendee may defeat plaintiff's right to pre-emption by showing that plaintiff has lost his superiority between sale and institution.

(vii). P. R. 91 of 1909.

Robertson, J:—

Admittedly the plaintiff may lose his right by a change in his own position. I do not think it necessary to go beyond the date of institution.

(viii). XXI All. 374 F. B.

In order that a suit for pre-emption may be successfully maintained, it is necessary, not only that a cause of action should exist in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit was brought.

A person suing as co-sharer must show his right and status as a co-sharer subsisted not only at the date of sale, but also at the date of the institution of the suit.

(ix). X. All. 472., *vide* (4) *infra*, p. 182.

(3) that the qualifications need not be retained after the date of sale.

P. R. 91 of 1909. Shahdin, J:—

Any loss of status by the pre-emptor after the sale does not affect the relative positions of the pre-emptor and vendee.

It seems to me that the proposition (that a pre-emptor loses his right of pre-emption by deterioration of his own status) is hardly justified upon a strictly legal view of the right of pre-emption, at least as known in our own province. Under the Panjab Pre-emption Act, a pre-emptor's cause of action arises when a sale is made in violation of his rights, and it appears to me that in all cases in which a cause of action is well founded under the Act with reference to a state of things which existed at the time of sale, that cause of action, viewed as a valid ground of claim, cannot be lost by reason of a new circumstance coming into existence after the sale.

Kensington, J:—

I should have considerable hesitation in following rulings to the effect that later depreciation of a pre-emptor's right will bar his suit.

(4) The qualifications cannot be lost after decree and pending appeal.

(i). X All. 472.

The fact that a plaintiff was not in possession of the share in virtue of which she claimed pre-emption at the time she instituted her suit was immaterial: the Court should have ascertained whether the

plaintiff was, at the date of the suit, entitled at law to the share, and, if so, she was entitled to pre-empt. If, pending appeal, such share were sold in execution of decree in another suit, the plaintiff would not be prejudiced thereby: the Court of Appeal has merely to look to her position when the suit was filed.

(ii). P. R. 67 of 1912.

The fact that the pre-emptor had, after the lower Appellate Court had confirmed the decree passed in his favour by the first Court, sold the property in respect of which his right of pre-emption arose, did not entitle the other side to have the decree set aside on further appeal to the Chief Court, on the ground that the pre-emptor had lost all rights to pre-emption before the case was finally decided.

Mortgaging the pre-emptive tenement, however, is not parting therewith, for the simple reason that the ownership has not been divested, and the owner has not therefore ceased to hold the statutory qualifications.

(i). The fact that *maurusis* have mortgaged their tenancy (such mortgage being liable to be set aside by the owners), does not disentitle them to pre-empt.

(ii). See also XIV All. 195 and XX All. 19 and XXV All. 421 Definitions.—

Landowner (pp. 79, 81.)

(e). Granted that the qualifications must be retained, it has been held—

(1) that the qualifications can be lost by acts of the pre-emptor.

Vide P. R. 49 of 1901, 95 of 1901, 44 of 1903, 124 of 1907, 90 of 1909, (Clark, C. J., and Chatterji, J.), 91 of 1909, (Rattigan, J.) and XXI All. 441 *d. supra* (pp. 180, *et seq.*).

But it should be noted that the sale only of part of the pre-emptive tenement, even when there is a contract to sell the rest, does not deprive the pre-emptor of his right.

P. R. 80 of 1911

(2) That the qualifications may be lost by acts outside the control of the pre-emptor, *e.g.*, partition of joint property, *vide* C. A. 461 of 1900, 124 of 1907, 90 of 1909 (Clark, C. J., and Chatterji, J.), 32 of 1902, XXXII All. 567, *supra* (pp. 180, *et seq.*).

But *Contra* :—

34 of 1875.

Nor does anything turn on the fact that the property was purchased as an undivided share, and has since been divided off. For it is identically the same, and in one shape or the other remains the subject as to which the claim is made.

This last mentioned ruling appears to me to be more correct than those cited under (2) for the reason that the bargain, which is pre-emptible, is the bargain as it stood at the time of sale, and not as it afterwards became by act of the vendee, who, not being owner, had no right to effect partition or otherwise deal with it so as to alter its nature. To my mind the case is clearly distinguishable from one where the pre-emptor has, by his own act, deprived himself of his statutory qualifications.

P. W. R., p. 115 of 1906.

The plaintiff got a pre-emption decree in the first Court. In the meantime it was declared that the land in virtue of which he sued to pre-empt had been sold to him without full necessity and the usual declaratory decree was given. The Divisional Court held plaintiff could not pre-empt.

The Chief Court held that the right to pre-empt is determined *inter alia* by the pre-emptor's position at the time he made his claim, and that right was not lost by the deterioration in his status wrought by the declaratory decree.

(f). It is not necessary, however, for a vendee, who had equal or superior qualifications at the time of sale, to retain those qualifications for a moment after sale in order to defeat the pre-emptor, provided the vendee's qualifications were not defeasible.

(i) P. R. 44 of 1903.

The parting by the vendee with the property in respect of the ownership of which he claims equal rights with the plaintiff-pre-emptor before suit would not prevent him setting up his equal rights.

(ii). P. R. 90 of 1909.

Chevis, J:—

The plaintiff cannot get a decree by showing that the vendee has lost his superiority between sale and institution.

Clark, C. J:—

It is a well recognized principal of law that the position of a plaintiff is not the same as the position of a defendant.

(g). The qualifications which have to be compared must be qualifications which are not defeasible.

(i) P. R. 30 of 1893.

In 1857 M. Jamalpur, Hissar, was forfeited to Government except the shares of five *biswadars* A, B, C, D, E. The rest was sold and bought by F and G in auction.

In 1883 F parted with his rights to the original owners, but G refused to sell. F executed a sale in favour of A, B, C, D, E. Then G's sons sued

alleging the sale was *benami* for the old *biswadars* whose estates had been forfeited, but this was denied and the suit failed.

In 1888, A, B, C, D, E proceeded to mutate the plots in the names of the old *biswadars*, it being recited that the real sale occurred in 1883, and was followed by proprietary possession, but mutation was delayed, no reason being assigned.

G's sons sued to pre-empt in each case.

Held, plaintiffs had succeeded in proving a sale in 1888 and were entitled to pre-empt. In regard to the alleged sales of 1883, the only one there was evidence of was by F to A, etc., but the basis of the present suit was a sale by A, etc., to the *biswadars* in 1888.

There was a joint case No. 234 of 1892 proceeding between the same parties, some of the old *biswadars* having re-sold to some others of the old *biswadars*, who had already got plots from A etc., and these latter claimed to be *maliks* entitled to pre-empt, but, as they were in 30 of 1893 declared not to be *maliks* in respect of those plots, the defence, whatever it might otherwise be worth, was held to fail.

The principle is that where A buys 2 plots, the second before any suit *re* the first is filed, he cannot, in a suit *re* the second, maintain he is *malik* of the first, simply because, at the time of suit *re* the second, no decision of the suit *re* the first has been arrived at.

(ii) P. R. 55 of 1899.

A sold land in a joint *khata* to Z, and B sued to pre-empt and got a decree.

After this sale (25th August 1893), but prior to the institution of B's suit, some other land in the same *khata* was sold to Z, and M, a co-sharer in the *khata*, sued in respect thereof.

Both B and M's suit were tried together.

In M's suit Z urged he had become a joint-holder in the *khata* by virtue of the sale of 25th August 1893, and so his rights were equal to M's.

Held, owing to the decision in B's suit, Z could not maintain the contention, and M was entitled to the benefit of the decision, which went to the root of Z's status.

(iii). P. R. 23 of 1908.

A vendee who, by reason of a prior purchase, had become a landholder in the village, and as such was competent to resist the claim of a pre-emptor with respect to a subsequent purchase, cannot, if, in a pre-emption suit, he loses his first bargain, retain the subject-matter of the second bargain.

(iv). W. N. 1884 (All.) p. 169.

If, subsequent to a decree for pre-emption, and during the pendency of appeal in a totally separate litigation, a decree has been passed which directed that the pre-emptor was not entitled to the pre-emptive tenement, such adjudication deprived such pre-emptor of his pre-emptive right and rendered the decree for pre-emption null and void.

(v). XXVIII All. 642.

Where in a suit for possession by pre-emption, it appeared that the vendee had, prior to the date of the suit, made a second purchase *re* which no suit had been filed prior to the date of the institution of the suit in regard to the first purchase, but limitation had not expired in regard to the second purchase, held, that the vendee could not be considered, by virtue of his second purchase, to have been a co-sharer at the date of the institution of the suit on the first purchase.

Contra:—

P. R. 76 of 1881.

Where a claimant bases his claim in respect to a sale on the fact of his owning the pre-emptive tenement under a prior sale which is also subject of a suit, held, till that sale is cancelled and set aside, he is entitled to a decree.

(NOTE.—This is only partially opposed to the previous rulings).

(h). For a vendee to resist a claim for pre-emption he must prove that he himself had a right to pre-empt equal or superior to that of the pre-emptor.

P. R. 23 of 1908, P. W. R. 179 of 1912

(i). Where the vendee has, subsequent to sale and *ante litem*, conveyed to a person with equal or superior right to the plaintiff, the comparison of qualifications has to be made between the plaintiff and the new vendee, the reason being that the first vendee is considered to have made the re-transfer in recognition of a pre-emptive right superior to his own. Consequently, in such a case, the pre-emptor must fail.

(i). P. R. 138 of 1884.

A sold to B, who re-sold to C, (C having a better pre-emptive right), then D, who had rights superior to B, but inferior to C, sued A B and C for pre-emption of the first sale.

Held, D's suit failed, as there is no ground for holding that where, after a sale has taken place, an acknowledged pre-emptor comes forward and claims the bargain, and in recognition of his rights the vendee conveys to him, the latter can be ousted and made to give way to another pre-emptor with claims inferior to his own before the said pre-emptor sues to enforce his right by a suit.

(ii) P. R. 73 of 1898.

A having sold certain property in respect of which X and Y had equal rights of pre-emption to B, X privately purchased the said property from B. Subsequent to such resale, Y sued A and B for pre-emption. Held X, by his purchase from B, had asserted his pre-emptive title in so efficacious a form as to be entitled to have his bargain secured to him against everyone not having a superior right of pre-emption.

(iii). P. R. 69 of 1898.

The land in suit was, in the first instance, sold to 3 persons, of whom two were co-sharers in the joint holding and one was not. Subsequently plaintiff, who was also a co-sharer, sued to pre-empt, but shortly before the institution of the suit the stranger-vendee genuinely sold his share to another co-sharer.

Accordingly, at the time when the suit was instituted, the land was in the hands of 3 vendees against none of whom plaintiff could assert a superior right. It was, however, contended on behalf of plaintiff that regard must be had to the original transaction in which two vendees, who had equal rights with plaintiff, had joined with them in the purchase a third, whose right was inferior to that of plaintiff, and that the right of pre-emption, which plaintiff would in consequence have had as against the original vendees, could not be defeated by the subsequent alienation of the stranger and the substitution of a person against whom plaintiff had not a superior right.

Held, overruling the contention, the mere fact that at one stage a stranger had a share in the bargain could not be held to vitiate the right of the 3 persons who were the vendees at the date of suit, and resisted plaintiff's claim with one that was not inferior to his own.

(iv). C. A. 363 of 1902.

A co-sharer in a joint undivided holding sold his share to a stranger. Plaintiffs, co-sharers, sued to pre-empt. Prior to suit the vendee had transferred his bargain to another co-sharer. Held, the plaintiffs had no right to ignore the second sale, and were not entitled to claim even proportionate shares with the second vendee.

(v). C. A. 900 of 1904.

The vendee may sell to a person who has an equal right with the pre-emptor *ante litem* so as to defeat the pre-emptor's claim, provided the transaction be genuine.

(vi). P. R. 90 of 1909 F. B.

Rattigan, J:—

There is good authority for the proposition that, if the vendee had, prior to the institution of a suit by the pre-emptor, sold the house to a person who had a superior right to, or even an equal right with, the pre-emptor, the latter's claim must fail.

Chatterji, J:—

If the vendee acknowledges a pre-emptor's right and offers to convey the property to the latter by private sale, there is no reason why the pre-emptor should be driven to Court if the sale takes place before the other pre-emptor has filed his suit. In the case of a pre-emptor with a superior claim he keeps the purchase by virtue of his priority of right. In the case of a pre-emptor with an equal right, he keeps the reward of superior diligence in asserting his right.

(vii). P. R. 91 of 1909 F. B.

Clark, C. J:—

It may be conceded that plaintiff has lost his right of pre-emption where the vendee has transferred his rights to a person against whom plaintiff has no right of pre-emption.

(viii). XX All. 100.

In cases of pre-emption, the right of pre-emption does not survive if the land, which is subject to pre-emption, having been sold to a stranger is subsequently re-sold before suit by a stranger-vendee to a co-sharer having equal rights with those seeking pre-emption. In our opinion, until a suit has been brought by a co-sharer for pre-emption of the property sold to a stranger, another co-sharer can purchase from the stranger the share which has been sold to the stranger.

(ix). XXI All. 374.

If a vendee, after the sale, sells to a co-sharer, having an equal right with the plaintiff to pre-emption, the plaintiff cannot deprive the new purchaser of the benefit of his purchase.

(x). XXV All. 421.

Where a share has, in violation of the provisions of the *Wajib-ul-ara*, been sold to a stranger, if, before the institution of a suit for pre-emption, that share has found its way into the hands of a co-sharer whose rights of pre-emption as such are equal to those of the plaintiffs in a suit for pre-emption subsequently instituted, then the pre-emptor's suit will fail.

(xi). XXIII All. 247.

Where property, which is subject to a right of pre-emption, is sold to a stranger, such stranger may defeat the claim of a co-sharer, having a right of pre-emption, by a sale to a co-sharer having a similar right: but, in order that the re-sale may have such effect, it must be completed before any suit for pre-emption is brought by a co-sharer entitled to pre-empt.

(xii). XXIX All. 125.

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger, but before a suit for pre-emption is brought, passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained.

(xiii). XXX All. 467.

Where a re-sale is made before the institution of a suit to a co-sharer equally entitled with the plaintiff, the plaintiff cannot succeed, because at the institution of the suit he would have had no right preferential to that of the purchaser then holding the property.

Contra :—

S. A. 649 of 1895 (All.).

A subsequent re-sale by a stranger-vendee does not bar the right of a shareholder to obtain a decree for pre-emption against the purchaser-shareholder from the stranger.

(Overruled in XX All. 100).

Doubts were expressed in the following ruling by Rivaz, J., as to the applicability of the rule where the sale was to a person having only equal rights to the claimant.

P. R. 29 of 1892.

Though it has been ruled that a vendee may re-sell to a pre-emptor in recognition of his superior claims, which sale will hold good as against future claimants with rights superior to that of the original vendee, but inferior to that of the subsequent purchaser, there appears to be no authority for the position that a subsequent sale, either privately arranged or decreed by Court, necessarily bars the rights of other pre-emptors equally entitled with the last purchaser or decree-holder, especially in a case where the said pre-emptors have instituted their suit before the earlier claimant has perfected his title by obtaining a decree or otherwise.

But see *infra* (p. 189).

The following matters, however, must be noted in connection with this rule of law.

(1). The rule does not apply where the vendee re-conveys to the original vendor, for the effect of such a transfer is to undo the sale, and that is prohibited.

(2) Conveyances *pendente lite* by the first vendee to a person having equal or superior rights to the pre-emptor.

There is a distinct conflict of opinion as to whether the same rule applies in cases where the re-transfer is made *pendente lite* to a second vendee possessed of qualifications (a) superior to, and (b) equal to, those of the plaintiff.

In the majority of cases the doctrine of *lis pendens* has been rigorously enforced, particularly in cases where the new vendee has had rights only equal to those of the pre-emptor, both in cases where he has made a private bargain and where he has acquired the property by a consent decree, while, in some cases, it has been held that the acquisition of the property by a rival claimant with either superior or equal qualifications to the suing pre-emptor *pendente lite*, is merely an effective assertion of the right, which he is perfectly entitled to make without having resort to Court.

The latest Punjab authority takes the latter view, but I think its correctness is open to grave doubt in view of the long array of authorities to the contrary.

At any rate, in so far as such acquisitions by persons with equal rights are concerned, the view violates the rule that no act coincident with, or subsequent to, the sale can affect the comparison of titles between the pre-emptor and the vendee so long as the pre-emptor retains his qualifications. Their claims have to be considered with reference to their position at the time of sale, or, to take the extreme extension, that it is the date of institution that has to be regarded. In both cases the pre-emptor would, as against a person having equal rights, be at least entitled under section 17 to an equal division, and yet this view would preclude him getting any share.

Under the Act of 1905 the anomaly would have been still greater, for the effect would be to give the vendee the power of election, not as given in section 14 after the other rules of distribution had been exhausted, but before, by the simple expedient of allowing a consent decree to be passed in his favour—a view, I think, fraught with the greatest danger and tended to bring the administration of the law of pre-emption into disrepute. From another point of view also; it will be conceded that on

this question there can be no difference between an acquisition by private purchase and an acquisition by consent decree.

Both stand on the same footing so far as this matter is concerned, and yet, if the view taken of late is correct, it stultifies all the old learning as to superior diligence. As we find in the Chapter on Rules for Distribution, it was held that superior diligence did not manifest itself in getting a decree first, and yet this view clearly gives a colluding pre-emptor a preference by his getting his decree before the rival pre-emptor.

Under the present Act there is a similar objection also to the view, for the present view would allow a person to keep a bargain obtained by consent decrees, if he deliberately violated the procedure as to impleading rival pre-emptors.

I can see no justification for the contention in the case of exercise of the right by a consent decree, and the acquisition of the property out of Court only differs from an acquisition by decree in method, and not in any other way.

In so far as superior qualified claimants are concerned, the objection to the view is not so apparent, as there is no violation of the rules of distribution or deprivation of right, and there is force in the argument, that the superior qualified person is merely exercising a right out of Court, and without the expense of suing, which he would be practically certain to get in ordinary circumstances by resort to Court.

But even in such a case some important considerations are overlooked. For instance, suppose the superior pre-emptor has waived his right to pre-empt at the time of sale, or is coming forward simply to claim the bargain for someone else by purchasing out of Court after suit, in collusion with the vendee, in order to defeat the suing pre-emptor, who, perhaps, only sued because he knew the superior pre-emptor had waived his right, or was not in a position to obtain the bargain for himself. The inferior pre-emptor, under this view, is entirely debarred from making good a line of attack which he would be entitled to establish were the parties before the Court, for, though XXIX All. 125 might be taken to indicate the contrary, there is in law nothing to prevent a pre-emptor urging that a rival pre-emptor has waived his right or is suing for the benefit of another, for, as will be seen in the Chapter on Waiver, an act of waiver cannot be conditional and, if a pre-emptor waives his right in favour of the vendee, his waiver enures to the benefit of every person interested.

The view, therefore, though it has a certain speciousness attached to it, is not one, I think, to be followed. The rule of *lis pendens* is a wholesome

and salutary one, which fixes a definite period for determination of a claimant's right, and, to depart from it in any particular seems to me to open the door to endless chicanery and fraud and to continual changes of front rendering adjudication impossible.

The rulings, however, on both sides are here given:—

(a) rulings that a sale *pendente lite* to a rival claimant, whether by consent decree or out of Court, does not affect the plaintiff's right.

(i). *vide supra* P. R. 73 of 1898, 69 of 1898, C. A. 363 of 1902, C. A. 900 of 1904, XX All. 100, XXIII All. 247, XXV All. 421, XXIX All. 125, XXX All. 457, pp. 186, *et seq.*

(ii). P. R. 11 of 1893.

Any rights a vendee *pendente lite* may wish to set up as a purchaser from the original vendee, are of no avail against the plaintiff by reason of the doctrine of *lis pendens*, the alleged sale having taken place while the plaintiff's suit was pending and being, therefore, subject to the result of that suit.

(iii). P. R. 37 of 1894.

A mortgaged $\frac{1}{2}$ share of his estate to B, with a *baibilwafa* term of 3 years, and then mortgaged the other $\frac{1}{2}$ to B with a like term of 5 years.

B foreclosed in 1885 and 1888 respectively. In 1888 C sued for pre-emption and got a decree, but 6 days before the decree B resold to D without informing the Court. On appeal the fact was disclosed, and the Divisional Court ordered D to be impleaded and remanded the case under section 562, C. C. P. On remand it was held, that D had equal rights to pre-empt as C, and so C could only succeed as to $\frac{1}{2}$.

Held, though C and D held shares in a joint property such shares were distinct, and in claiming pre-emption there was no presumption C was claiming for any other sharer than himself, and, as D had not claimed pre-emption independently, the sale to him by B could not affect C's right.

(iv). C. A. 1228 of 1905.

A pre-emptor is precluded, by the rule of *lis pendens*, from acquiring property sold to a third party as against his pre-emptive right by means of a consent decree against the vendee during the pendency of a pre-emption suit previously filed by a rival claimant, who has since got a decree passed in his favour. Such acquisition by a consent decree is of no force against the rival claimant.

(v). P. R. 7 of 1906.

During the pendency of a pre-emption suit the original vendee allowed a consent pre-emption decree to be passed against him, in favour of a person, who had notice of the original suit and wished the sale to the original vendee to be maintained. Held, that the latter transaction must be deemed to be a sale reduced to the form of a decree and subject to the law of *lis pendens* and, therefore, ineffectual against the original pre-emptors.

(vi). P. R. 7 of 1910.

A sale to a pre-emptor out of Court, when he and a rival are suing, and their rights are equal, will, it being *pendente lite*, not operate to put him in a better position than his rival, nor will his own rights be diminished by taking the property by sale, instead of by decree.

(vii). XXX All. 467.

After the filing of a suit for pre-emption, but before service of summons on the defendants, the defendant-vendee re-sold the property claimed to a second vendee, who had equal rights as a co-sharer with the plaintiff. Held, the doctrine of *lis pendens* applied and the plaintiff was entitled to a decree.

(b). Rulings that where the vendee transfers *pendente lite* to a person having an equal or superior right to the plaintiff, the plaintiff's claim is effectually defeated.

(i). C. A. 1224 of 1890

Where, before a notice of the plaintiff's suit for pre-emption was served on the vendee, the latter in good faith transferred his bargain to a person having a right superior to that of plaintiff and the vendee, held the plaintiff's suit must be dismissed.

(ii). 26 of 1908.

The doctrine of *lis pendens* does not apply to a sale of immoveable property, subject to a right of pre-emption, by the original vendee in favour of a pre-emptor with superior rights, who had instituted a suit to enforce his rights during the pendency of similar suits by other claimants with inferior rights.

(iii). P. R. 91 of 1909

Rattigan, J:—

At any time prior to decree the claimant may lose his so-called right, because the original vendee has transferred the property claimed to a person who has rights of pre-emption in respect thereof, either equal or superior to those of the claimant.

(iv). P. R. 53 of 1911.

Where after the institution of a suit for pre-emption another pre-emptor asserted his right of pre-emption privately and the vendee, in recognition of his right, transferred the property to him, held, the doctrine of *lis pendens* did not apply to such transfer and the transfer would bar plaintiff's suit, unless plaintiff had superior rights of pre-emption to the transferee.

(3). The rule in respect to *ante litem* sales only applies where the second sale has been a *bonâ fide* one.

(i). *Vide* C. A. 900 of 1904, C. A. 1224 of 1890. P. R. 73 of 1898, *supra* (p. 187, *et seq.*).

(ii). P. R. 30 of 1893 Note.

We doubt if the ruling in P. R. 138 of 1884 would apply where the sale to the pre-emptor is not *bonâ fide*.

(4). The rule is not affected if the second vendee would, by an act amounting to waiver, have been barred from suing himself.

XXIX All. 125.

The rule is not affected by the fact that the co-sharer, to whom the property sold to a stranger reverts was a party to its sale to a stranger.

(In the particular sale 7 shares were sold by 7 different deeds to one vendee. In two of them A and B had shares and they sold with the others, having also shares which they did not sell. Then the vendee re-sold to A and B the whole property).

The correctness of this judgment seems to me open to grave doubt, as it is a well-established principle that a right, once waived, cannot be resurrected, and I cannot see why a person who has waived should be allowed to defeat a pre-emptor outside Court when he could not do so in Court.

(5). A suit becomes "pending" as soon as it is filed.

(i). XXIX All. 339, Privy Council.

Where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit in order to make it a contentious one, within the meaning of section 52, Transfer of Property Act, and render the doctrine of *lis pendens* applicable.

XXX All. 467.

(ii). The doctrine of *lis pendens* applies to any alienation made after the institution of the suit.

Contra :—

P. R. 32 of 1899.

Where issues have not been fixed in plaintiff's suit the doctrine of *lis pendens* is not strictly applicable. We do not question the vendee's right to transfer before a decree has been passed.

Of. C. A. 1224 of 1890 (p. 192).

(6). Where, however, the new vendee, who has bought *pendente lite*, is impleaded by the plaintiff pre-emptor and the issue of preference between them is raised, the latter cannot claim the benefit of the doctrine of *lis pendens*.

(i). XXVII All. 544 F. B.

After the filing of a suit for pre-emption, but before service of summons, the heirs of the vendee re-sold the property claimed. Plaintiff impleaded the new vendee in his suit and amended his plaint, raising fresh issues as against the defendant so added, (*viz.*, as to which had a preferential right), and the defendant added also filed a written statement and the issue between the plaintiff and the added defendant was decided in favour of the defendant.

Held, plaintiff could not, after himself causing the second vendee to be added as a party, and issues decided as to his rights, still plead, in bar of the claim put forward by that defendant, the doctrine of *lis pendens*.

(ii). XXX All. 467.

In this case the second vendee was added by the Court as a party defendant, but the plaint was not amended, and the plaintiff did not seek to pre-

empt the sale made in his favour; held, plaintiff could succeed, but also, if he had made the second vendee a party and gone to issue on the question of their respective rights, he would have forfeited the benefit of the doctrine of *lis pendens*.

(7). The rule applies when the transfer is made *pendente lite* to a person with superior pre-emptive qualifications, whose claim to pre-empt is time-barred.

P. R. 30 of 1911.

The doctrine of *lis pendens* applies to an exchange of land made during the pendency of a suit for pre-emption, in favour of a person who had a superior right to pre-empt, but who had not enforced that right, and whose right to sue had become barred by lapse of time before the exchange.

CHAPTER V.

BASIS OF THE RIGHT OF PRE-EMPTION.

STATUTE AND CUSTOM.

1. Basis of pre-emption of rural property is Statute only.
2. Basis of pre-emption of urban property is Custom.
3. Exclusion of Contract.
4. Essentials of Custom.
5. Contracting out of the Act is impermissible.
6. Evidence sufficient to establish custom in towns.
 - (1) Instances in neighbouring *mohallas*.
 - (2) Existence in neighbouring *kuchas*.
 - (3) Non-existence in new *mohallas* as affecting old *mohallas*.
 - (4) Existence in towns as affecting suburbs.
 - (5) Cases of compromise or confession of judgment.
 - (6) Oral evidence.
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 - (8) Sales unsupported by deeds.
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 - (11) No presumption in towns.
 - (12) Relevancy of history of town.
 - (13) Acquiescence in previous sales.
 - (14) Attestation by neighbours.
 - (15) Custom of other places.
 - (16) Previous conduct.
 - (17) Vendor's notice to pre-emptor.
 - (18) Cases decided without enquiry.
 - (19) Unappealed cases.

- (20) Unsuccessful cases.
 - (21) *Onus*.
 - (22) Strictness of proof.
 - (23) Considerations of equity.
 - (24) Form of evidence.
 - (25) Section 48, Evidence Act.
 - (26) Cases under old law—how far relevant.
7. *Ratio decidendi* in particular cases.

CHAPTER V.

BASIS OF THE RIGHT OF PRE-EMPTION.

STATUTE AND CUSTOM.

1. The right of pre-emption in regard to rural property, *i. e.*, agricultural land and village immoveable property, is based on a different foundation than that in regard to urban property.

The basis of the right in regard to rural property is no longer Custom, but Statutory Law, and the provision relating to it is section 6, which runs :—

“A right of pre-emption shall exist in respect of agricultural land and village immoveable property, but every such right shall be subject to all the provisions and limitations in this Act contained.”

The previous law has been sketched in the Chapter on the Acts of 1905 and 1913 as also have the changes wrought by the present Act. The effect of this section, which repeats section 5 of Act II of 1905, has been to simplify the law, and much legal knowledge accumulated under the Punjab Laws Act relating to the effect and value of the *Riwaj-i-am* and *Wajib-ul-arz*, so far as it affects pre-emption, is rendered obsolete.

It should be noted that under section 2 (2) it has been provided that nothing in the present Act shall affect the provisions of the Punjab Tenancy Act, sections 53 and 54. These sections deal with alienations of occupancy tenures by the occupancy tenants, giving to the landlord the first claim to purchase. These sections remain unimpaired by any provision in the present Act.

2. The basis of the right of pre-emption as regards urban immoveable property continues to be as it used to be, custom.

Section 7 provides that “a right of pre-emption shall exist in respect of urban immoveable property in any town or sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division at the time of the commencement of this Act, and not otherwise.”

3. This provision appears to have expressly provided that no right of pre-emption can be created by contract, so excluding the old rulings which allowed the right to be so created,

These old rulings are—

P. R. 98 of 1894.

I see no ground in principle why a right of pre-emption should not be created by contract, although it might be conceded that a custom of pre-emption cannot be so created.

XXII All. 239.

A covenant giving the mortgagee a right of pre-emption of the mortgaged property in case of sale by the mortgagor to a third party is *prima facie* a good covenant and enforceable by the mortgagee.

The prohibition of the creation of a right of pre-emption by contract was possibly not intended, but the wording of the section appears to leave no doubt that such contracts are now illegal in the Punjab.

4. The sole basis, therefore, for pre-emption in towns being custom, we have now to see what the essentials of a custom are.

They are briefly—

(a). That it must have been in existence at the commencement of the Act.

That is to say that, henceforth no new custom of pre-emption can grow up, but this, of course, does not mean that instances of the exercise of the right of pre-emption after the passing of the Act are irrelevant, but they would not in themselves be sufficient to establish the right.

Probably by an inadvertence section 6 of Act II of 1905 has been repeated verbatim in section 7, Act of 1913. The result is peculiar for, whereas in sales completed before the present Act came into force, no custom can be relied upon which did not exist before 11th May 1905, under the present Act a custom existing up to 1913 can be relied on, *i. e.*, the growth of custom, which has been statutorily barred for 7 years has been revived for new, but not for old, cases.

(b) The custom must be well-known and ancient.

(i). P. R. 21 of 1900.

It is a necessary ingredient of a valid custom that it shall have existed from a time so long that the memory of man runneth not to the contrary.

It is not for the Courts to invent a custom of pre-emption.

(ii). P. R. 16 of 1902.

The custom should be well-known, well-established and ancient. It is not for the Courts to invent a custom by carelessly passing decrees, founded on fallacious grounds, as to the likelihood of pre-emption prevailing in a particular town without making thorough enquiry.

Contra :—

XXVIII All. 434.

In order that a custom of pre-emption may be held to be established, it is not necessary to show that the custom is immemorial in the sense of the English Common Law. Hence where in a village, which came into existence in 1846, there was found evidence in 1869 of a custom of pre-emption, and further evidence of such a custom in 1885, it was held that the custom was sufficiently established for the Courts to give effect to it.

Section 7 seems to be based on a disregard of this principle, for a custom which has grown up in recent years can hardly be called "ancient," but the Punjab Courts have frequently held that a custom is variable and can be shown to have changed from an old custom of the past to a new custom of the present and the new custom will, in such cases, be given effect to. Such a principle appears to me to be opposed to sound legal principles.

5. It should also be noted that contracting out of the Act is impermissible so as to destroy the right of pre-emption.

C. A. 1066 of 1907.

Where on the Sidbnaï Canal agricultural land is leased by Government to occupiers, with an option of buying after a certain period and subsequently sold on the option, the lease containing a term exempting the land from rights of pre-emption, such clause being reproduced in the sale-deed, held, that such stipulations, even when Government is a party, cannot override the provisions of the Pre-emption Act so as to deprive plaintiff, who was not a party to it, of his pre-emptive rights when the lessee vendee sells his interests to a third party.

(NOTE.—So far as Government is concerned, it has ample powers to meet such a case beforehand under section 8 (2), and in this particular instance it has done so.)

6. We have now to enquire as to what evidence suffices to establish the existence of a custom of pre-emption.

It is proposed to mention certain principles in the first instance, and then give specific cases showing what evidence the Chief Court has held sufficient to establish a custom and what not.

The following principles may be laid down :—

(1). The existence of a custom in neighbouring *mohallas* or in a town generally is a relevant fact, but is insufficient in itself to establish its existence in the *mohalla* where the property in suit is situated or to raise a presumption to that effect.

(i). P. R. 100 of 1892.

If a town be composed of several sub-divisions, the fact that the custom of pre-emption is found to exist in one of such sub-divisions does not lead *per*

se to the presumption it exists in another. The existence of the custom in another sub-division is a relevant fact, but it does not give rise to a presumption which puts the *onus* of proving or rebutting on the defendant.

(ii). P. R. 17 of 1895.

To prove a claim the plaintiff wished to prove that in neighbouring *mohallas* the custom applied to shops as well as houses.

Held, under section 11, Punjab Laws Act, it was incumbent on the plaintiff in a pre-emption suit *re* urban immoveable property to establish the right and its incidents, and proof that the custom exists in other neighbouring *mohallas* of the town could, at best, only supplement plaintiff's evidence regarding its existence in the *mohalla* where the property in dispute was situate, and could not supply the want of such evidence.

The existence of the custom in adjoining *mohallas* is a relevant fact, but is insufficient to dispense with other evidence.

(iii). C. A. 526 of 1897.

Instances in other sub-divisions are at best supplementary proof.

(iv). P. R. 70 of 1899.

In suits for pre-emption of town property, however probable and fair-seeming plaintiff's claim may be, he should never be relieved of the *onus probandi* of the existence of the alleged custom in the special locality in which the property is situate. Proof of its existence in neighbouring *mohallas* being at best only supplementary of the evidence required of plaintiff.

(v). P. R. 58 of 1900.

The fact that the right of pre-emption exists in other or neighbouring *mohallas* of the town is not *per se* sufficient to prove its existence in the particular *mohalla* in question.

(vi). P. R. 109 of 1900.

The remark about the custom of pre-emption being shown to exist in a town, in places other than a particular locality, may, unless rebutted, establish the custom in that locality, also has a very remote relevancy on the question before me and has not been fully accepted in later decisions.

(vii). P. R. 69 of 1901.

In suits for pre-emption in respect of property situate in a town, where the custom is not universal, it is necessary for the plaintiff to prove that it exists in the particular *mohalla* in question or throughout some larger area of which it forms part.

(viii). P. R. 83 of 1901, C. A. 751 of 1905, P. R. 264 of 1908, P. W. R. 139 of 1911.

Instances in other sub-divisions are at best supplementary proof.

(ix). P. R. 86 of 1901.

The law of pre-emption requires a certain stringency in deciding the question of the existence of such a custom in a city or sub-division thereof, and does not permit a finding in its favour simply on the ground that it exists in the neighbouring sub-divisions, if there is no instance in the quarter in which the disputed property is situate.

(x). P. R. 16 of 1902.

Proof that the custom exists in other or neighbouring *mohallas* of a town can at best only supplement evidence regarding its existence in the *mohalla* where the property in suit is situate, and cannot supply the want of such evidence.

(xi). P. R. 42 of 1903.

Though the existence of a custom of pre-emption in a particular sub-division has to be established, instances in the neighbouring sub-divisions, though not of themselves sufficient to prove the existence of such a custom in that sub-division, are evidence of such existence.

(xii). P. R. 44 of 1903.

Though instances of the existence of the right of pre-emption in other *mohallas* is not sufficient to prove its existence in this *mohalla*, they lend support to other evidence.

(xiii). P. R. 42 of 1906.

The fact that instances of the exercise of the right exist in other sub-divisions may be considered, but they cannot be held alone, in the absence of any instances in the sub-division concerned, to prove the existence of such a custom.

Where there are cases holding the existence in a town generally, they carry weight in support of the contention that the custom exists in a particular sub-division.

(xiv). P. R. 129 of 1906.

Although, in suits for pre-emption in respect of property situate in a town, the existence of the custom within any specified area forming a sub-division within the meaning of section 6, Pre-emption Act, 1905, has to be established, the instances in the neighbouring sub-divisions and in the city, including the area, are relevant and useful to strengthen the proof of such existence.

(xv). P. R. 140 of 1906.

Existence of the custom in adjoining sub-divisions is relevant, though not *per se* conclusive.

(xvi). P. R. 26 of 1907.

Cases from other *mohallas* are merely relevant and not direct proof of the existence in the particular *mohalla*.

(xvii). P. R. 59 of 1911.

It may now be accepted as a received proposition of law, that in every case where a town is sub-divided, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property is situate, and that the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions.

(xviii). VII All. 916.

The fact that a custom exists generally in a town is not sufficient reason to presume it exists in a particular *mohalla*.

Contra :—

(i). C. A. 1579 of 1879.

Where there is evidence of the existence of a custom in a locality, the *onus* of proving it does not exist in a *mohalla* in that locality rests on the defendant.

(ii). P. R. 55 of 1880.

The circumstance that the right of pre-emption exists in other *mohallas*, comprised in the same *taraf* of the town, may, perhaps, be regarded as raising a presumption that it exists in the most recently created *mohalla*.

(iii). P. R. 33 of 1885.

If it is found that the custom exists very generally in the city of Jullundur and to prevail in *mohallas* adjacent to *mohalla* Muftian, the burden of proof, in the absence of circumstances showing why the custom should be different in this *mohalla*, may be shifted to defendants, who may, under the circumstances stated, not unreasonably be called on to show that the custom does not exist in this particular *mohalla*.

(iv). P. R. 64 of 1887.

Plowden, J :—

Assuming a particular town to contain several sub-divisions where pre-emption is claimed, it is incumbent on the plaintiff to prove that the custom of pre-emption prevails in that sub-division. I do not doubt that evidence that the custom of pre-emption exists in other sub-divisions is relevant evidence on the issue, whether it exists in the particular sub-division where its existence is disputed. If such evidence is relevant, then the question, whether its existence is proved in that particular sub-division, is, in this and all similar cases, a question of fact, and not of law at all. It resolves itself into the question of what is the proper inference from all the relevant evidence in the case.

Looking at the matter as a question of fact, it might be rightly decided that the custom of pre-emption exists in a particular sub-division on proof that it exists generally throughout the city and in adjacent sub-divisions, notwithstanding that there was no proof of the actual exercise of the right in that particular sub-division. The absence of such proof would be a matter for consideration, but not necessarily conclusive.

This sort of evidence has been given in this case and rightly accepted.

Burney, J :—

I am of opinion, as plaintiff has clearly proved, the custom exists in many other parts of the city, and has given a good deal of evidence to prove the custom exists in the near locality, the *onus* is on defendant to disprove its existence in the particular *mohalla*.

(v). P. R. 105 of 1887.

Pre-emption certainly prevails in Wazirabad as a whole. There is nothing in the constitution of *Mohalla* Lakhian to suggest the inference that it is a sub-division of the town differing from the other sub-divisions, and it is certainly not proved that it does so differ.

(vi). P. R. 138 of 1888.

If it is shown that the custom exists very generally in the town of Batala or in the neighbouring *mohallas*, the *onus*, that it does not exist in *Mohalla* Jhulkian, may be shifted to defendants.

(vi). P. R. 165 of 1888.

The fact of the custom existing in other *mohallas* raises a strong presumption that it exists in the *mohalla* in which the house is situated where the *mohalla* is small.

(viii). P. R. 170 of 1889.

Where pre-emption is found to prevail in some sub-divisions of a city, it may be presumed, until the contrary is shown, to prevail in others also. But this does not apply to show a custom exists in suburbs outside a city wall.

(ix). P. R. 68 of 1890.

Proof that a custom exists in a town generally *qua* locality is good evidence to prove it prevails in any particular *mohalla*.

(x). P. R. 78 of 1911.

Instances of pre-emption in the neighbourhood of the *mohallas* in question may indicate the existence of the custom of pre-emption in that *mohalla*.

(xi). X All. 585.

If a custom be proved to exist generally in a town, the fact that there is no evidence of its existence or enforcement in a particular *mohalla* is immaterial. The custom applies to the whole town, and the greater includes the rest. To exclude a particular *mohalla*, evidence should be given that the custom does not extend to it.

(2). The existence of a custom in neighbouring *kuchas* is sufficient to show it exists in the *kucha* into which they run.

P. R. 138 of 1907.

The existence of a custom of pre-emption in the neighbouring *kuchas* is sufficient to prove the existence of such a custom in a small blind alley (*kucha sarbasta*) into which they run, though no case of pre-emption may have occurred in it.

(3). The non-existence of the custom in new *mohallas* does not affect the question of its existence in old *mohallas*.

P. R. 122 of 1907.

The fact that the custom has been found not to exist in new *mohallas* does not affect an old *mohalla* in which there are instances.

(4). The existence of the custom in an old town does not affect the question of its existence in new suburbs thereof.

P. R. 170 of 1889, *vide* 1 viii *supra*. (p. 203).

P. R. 70 of 1898.

The fact that there is a well-established custom in the old town does not extend the custom to new suburbs thereof.

(5). Cases of compromise or confession of judgment are—

(a). Valueless.

(i). P. R. 17 of 1895.

Where plaintiff's right has been admitted, the admission by the defendant renders such case valueless as a precedent regarding custom in another case.

(ii). P. R. 58 of 1900.

A case of pre-emption decreed on an award may be summarily dismissed from consideration. A case decided in accordance with a compromise is not a relevant and material precedent.

(b). Of little value.

(i). P. R. 170 of 1889.

Oral evidence of instances, where bargains are said to have been surrendered to pre-emptors without a suit, is not of any great value.

(ii). P. R. 68 of 1890.

Where two cases of admission out of Court were proved, held, that all the instances established was, that in one case an intending purchaser, in the other an actual purchaser gave way in preference to risking a law suit, or, in other words, that there was a belief there was such a custom.

(iii). P. R. 85 of 1893.

Where a claim has been compromised, it is impossible to say what weight has been attached to the basis of the claim.

(iv). P. R. 69 of 1901.

Where the right has either been admitted or the case compromised, the instances are of much less value than they would otherwise have been.

(v). P. R. 16 of 1902.

Cases based on confessions and compromises ignored.

(vi). P. R. 17 of 1903.

Case based on compromise disregarded.

(vii). P. R. 42 of 1906.

C. A. 3 of 1899.

Isolated cases of compromise are not of much value as precedents.

(viii). P. W. R. 139 of 1911.

(c). Relevant, their value depending on all the circumstances.

(i). P. R. 42 of 1903.

Where in a suit for pre-emption the vendee admitted the right, we cannot accede to the contention that the instance is valueless to prove the custom. It is an instance of a recognition of a right which is relevant under section 13, Evidence Act.

(ii). P. R. 44 of 1903.

With reference to P. R. 17 of 1895, the remarks on the value of cases decided on admission or in which the right was not contested, appear to us to

be extended beyond their proper scope in the argument. A case in which pre-emption is claimed and decreed on admission is an instance in which the custom is exercised within the meaning of the Evidence Act, and is relevant to an enquiry into the custom in a subsequent suit.

There are countless motives which might actuate a defendant in making an admission in Court, and it is difficult to say that the knowledge of the custom alone impelled him to make the admission. The value of it, therefore, to a large extent, depends on the circumstances of the particular case. Where there are numerous instances of such admission in the same place, it is generally a fair inference they were due to the custom being too well-known to admit of dispute.

(iii). C. A. 1165 of 1905.

Instances on which pre-emption was decreed on the basis of a compromise are certainly relevant and possess certain probative force as showing the existence of the custom, but, when set against other instances, though fewer in number, in which, after contest, the custom was negatived or held not proved, they cannot form a substantial foundation for finding the custom prevails generally in a town.

(iv). P. R. 42 of 1905.

Though the fact that instances relied on were cases where the right was assumed or admitted, and thereby the value of the judicial decisions were weakened, they lend force to the argument that the existence of the custom was generally admitted.

(v). P. R. 38 of 1906.

Cases where the right has been successfully asserted without suit are as good instances as if the matter had been decided by a confession of judgment in a suit in Court, and taken in connection with the vendee's own conduct, who undeniably took a mortgage in order to avoid the claim by pre-emptors, they form a very substantial proof that the custom of pre-emption does exist in this *mohalla*.

(vi). P. R. 42 of 1906.

Where the compromise involves the admission of the right of pre-emption as a basis for compromise, and there are a number of such instances, they cannot be set aside as possessing no value. Though possibly insufficient in themselves to prove a custom, they lend support to more cogent evidence.

(vii). P. R. 113 of 1906.

It is impossible to say an instance of a compromise decree is valueless, even if it does not count for very much.

(viii). P. R. 6 of 1907.

A case of admission treated as valuable evidence.

(ix). P. R. 26 of 1907.

Cases in which the right is claimed and decreed on admission are instances of the right being exercised within the meaning of the Evidence Act, and are therefore relevant to prove the existence of a custom.

(x). P. R. 147 of 1908.

(xi). P. R. 96 of 1910.

We do not think that cases decided on compromise or admission are altogether valueless.

(xii). P. R. 78 of 1911.

Uncontested instances are by no means worthless evidence of the existence of the right

(xiii). P. R. 92 of 1911.

We agree that cases in which vendees admit the existence of the custom of pre-emption are as valuable as cases in which the Court finds the custom established. But between such cases and cases in which the vendee, after denying the custom, eventually is induced to come to terms and to compromise the dispute, there is a substantial distinction.

(6). Mere oral opinion is of little value.

(i). P. R. 24 of 1887.

Bald statements by witnesses. . . unless they rest on actual instances, are worth little or nothing.

(ii). P. R. 85 of 1893.

Where oral evidence is given of a custom, it is of no value when the witnesses are unable to cite a single instance of its exercise.

(iii). P. R. 17 of 1895.

Oral evidence is of little value. It consists at best of opinions, and these are of no account unless supported by precedents.

(iv). P. R. 109 of 1900.

Mere opinions not based on instances are generally valueless to prove custom.

(v). P. R. 67 of 1906.

Opinions of witnesses is evidence of comparatively trifling value when no actual instances are quoted.

(vi). P. R. 68 of 1907.

Oral evidence, except in so far as it relates to definite instances in which the alleged custom has been set up, is necessarily of no value.

(vii). P. R. 92 of 1911.

(7). Evidence of a custom given in a previous case is inadmissible, not being between same parties.

P. R. 17 of 1903.

(8). Alleged sales, not supported by deeds, should be rejected.

P. R. 6 of 1907.

The Court rightly rejected alleged sales unsupported by sale-deeds.

Cf. P. R. 92 of 1911.

(9). Previous decrees are relevant, though not *per se* conclusive. They, however, form very strong evidence.

(i). C. A. 1165 of 1905. *Vide* (5) (c) *iii supra*. (p. 205).

(ii). P. R. 122 of 1907.

The want of claim generally proves nothing, while a single successful claim goes far to establish the custom.

(iii). N. W. P. H. C. R. 1868, p. 138.

Such judgments were admitted in evidence.

(iv). X. All. 585.

In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom in suits in which it was alleged and denied is admissible as evidence to prove the existence of the custom. As they were not in suits between parties, they are not conclusive, but they are excellent evidence to show the right was asserted in the town by other persons and was recognized by the legal tribunals.

The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.

(10). Erroneously decided cases are relevant.

P. R. 38 of 1906.

Though the view on which a case be decided is incorrect, the fact that in such case it was decided that the right of pre-emption existed is a relevant fact to show the right was effectively exercised.

Contra :—

P. R. 16 of 1902.

A case decided on an erroneous view of law ignored.

(11). There is no presumption for or against pre-emption in towns.

(i). P. R. 13 of 1890.

There is no presumption for or against pre-emption in towns, and it is for the person asserting its existence to prove it.

(ii). P. R. 51 of 1907.

In a town there is no presumption as to custom, the custom must be proved.

(12). The history of a town's development is relevant.

(i). P. R. 64 of 1887.

History of Delhi as a Muhammadan town considered as leading to the conclusion that pre-emption was general in the city.

(ii). P. R. 170 of 1889.

Fact that the suburb, where the property claimed was situate, was of recent growth considered as showing it was improbable pre-emption existed there.

(iii). P. R. 87 of 1890.

The fact that the suburb, where the property was situate, had only grown up in the last 25 years considered as showing it improbable custom existed there.

(iv). P. R. 8 of 1893.

No doubt, if it could be shown that the quarter was a compact Muhammadan one, following in general Muhammadan Law, there might be grounds for presuming that its custom as regards pre-emption was the same as the law.

(v). P. R. 70 of 1899.

The fact that Hansi was under the influence of a Muhammadan Government in past times considered, but not allowed to weigh in the absence of other evidence.

(vi). P. R. 21 of 1900.

The fact that Jahannuma (Delhi) was of recent growth, and was useless waste ground prior to the Mutiny, considered as showing no likelihood of custom there.

(vii) P. R. 16 of 1902.

The history of the development of the town of Bhawani in the agricultural area of an old village does not make it probable that any custom of pre-emption has become rooted there.

Also the fact that the town was of pure Hindu origin considered as pointing to the same conclusion.

(viii). P. R. 70 of 1902.

Looking to the origin and history of growth of rights of pre-emption in towns, it is highly improbable that the custom could be proved in so petty a town as Mukerian.

(ix). P. R. 42 of 1905.

History of Nur Mahal (Jullundur) considered as showing the right existed there.

(x). P. R. 26 of 1907.

Rawalpindi is largely Muhammadan, and therefore presumably saturated with Muhammadan ideas.

(xi). P. R. 32 of 1909.

Fact that the town had a long history, and a preponderating Mussulman population, considered.

(13). Acquiescence in previous sales, though relevant evidence, is of little value.

(i). P. R. 48 of 1883.

It is not enough to show sales have taken place without objection, for it is discretionary with co-proprietors to object or not, and their mere acquiescence

in previous sales does not imply that the custom which would entitle them to object to the sales and claim the benefits for themselves has been abrogated.

(ii). P. R. 99 of 1906.

One contested case shows the custom is not entirely undisputed, whereas evidence of a large number of instances of its observance without question would not show complete unanimity in its favour.

(iii). P. R. 122 of 1907.

The want of previous claims generally proves nothing.

(14). Frequent attestations by neighbours of the property sold is relevant and important.

P. R. 116 of 1908.

Where it is shown that in numerous uncontested sales the vendor and vendee took the precaution of obtaining the signatures of neighbouring owners to deeds, it strongly suggests the parties were well aware of the existence of the custom.

(15). The custom of one place is irrelevant to prove the existence of a custom in another.

(i). P. R. 85 of 1893.

In deciding what the custom is in a particular place evidence as to the custom of other places is of no consequence.

(ii). P. R. 98 of 1894

The usage of other localities does not govern this locality.

(16). Previous conduct is relevant.

P. R. 108 of 1895.

If the vendees at the time of the purchase believed that pre-emption attached to the property or admitted it in Court, and acted on that understanding in arranging for the purchase, and in another case, on a claim in regard to property of this description being advanced by a pre-emptor, they parted with a considerable sum of money to settle with him, it is, I think, a fair inference that the right is recognized by custom.

P. R. 32 of 1909.

Quotes P. R. 108 of 1895 with approval.

(17). Vendor's notice to pre-emptor to buy is a good piece of evidence in support of the custom.—P. W. R. 52 of 1911.

(18). Cases decided without enquiry are of little value.

(i). P. R. 170 of 1889.

Cases where there was no enquiry into custom and the right was taken for granted are not of much value.

(ii). P. R. 17 of 1895.

A case of compromise where the Court made no enquiry and gave no opinion as to custom rejected as a precedent.

(iii). P. R. 58 of 1900.

A case where pre-emption has been allowed without enquiry cannot be regarded as of any value as an index to custom in the present case.

(19). A case decided, but not appealed against to the Chief Court, though relevant, is not quotable as a ruling case.

P. R. 70 of 1899.

A case deciding pre-emption can hardly be quoted as a ruling one, when no appeal has been made to the Chief Court.

(20). It is not essential, in order to defeat a claim, to prove previous unsuccessful claims.

P. R. 58 of 1900.

We cannot concede to the argument that where a claim for pre-emption is put forward, it is essentially necessary for the vendees to prove that, in previous cases, such claims had been successfully controverted.

(21). The *onus* is on the plaintiff.

(22). Proof must be strict.

(23). Considerations of equity are insufficient.

(24). The law prescribes no particular form of evidence.

P. R. 64 of 1887.

Plowden, J :—

Section 11, Panjab Laws Act, neither prescribes nor restricts the mode of proving the existence of the custom. The incidents of the custom, *i. e.*, by whom and under what circumstances it may be exercised, is a distinct matter. Section 11 imposes on plaintiff the burden of proving that the local custom sustains the claim advanced by him. The law goes no further than that, and it is a question of evidence and of fact whether the claim is warranted by local custom.

(25). Subject to the above interpretations, the principles of section 48, Evidence Act, are applicable to cases of pre-emption.

(26). The following principle is now of mere academical interest :—

Proof that custom exists in regard to houses is insufficient to prove the custom exists in regard to shops.

P. R. 68 of 1890, 17 of 1895, 108 of 1895, 58 of 1900, 54 of 1907.

Contra :—

P. R. 48 of 1888.

But—

(27). All previous instances of a successful claim, no matter on what qualification or in respect to what kind of property they were made, are relevant to prove a custom.

But unsuccessful assertions of the right on qualifications not now recognized by statute or in respect to property not now subject to pre-emption are irrelevant to disprove.

7. Ratio *decidendi* in particular cases in the Chief Court.

A.—In the following cases pre-emption was found to exist on the evidence stated :—

FOR

AGAINST.

(i). P. R. 154 of 1882.

1 case holding custom existed, though finding based on other grounds.

2 cases in adjoining *katra* decreed.

10 cases in neighbouring *katra* decreed.

Oral evidence showing it is customary to offer to neighbours.

Several cases in *gali* of purchase by strangers.

1 case in neighbouring *katra* where claim rejected.

(ii). P. R. 12 of 1883.

3 decided cases in favour.

Oral evidence in favour.

(iii). P. R. 40 of 1883.

Oral evidence as to custom.

1 case where custom not denied.

1 case decided by a Tahsildar.

(iv). P. R. 56 of 1885.

3 cases in favour.

Consensus of opinion.

1 case against.

(v). P. R. 10 of 1886.

1 case decided by Chief Court.

(vi). P. R. 108 of 1886. (A case of proximity as opposed to contiguity).

1 instance of proximity.

General principles of equity and intent to exclude strangers.

1 Chief Court case against proximity but in favour of contiguity.

(vii). P. R. 64 of 1887.

Oral evidence in favour.

12 cases in city.

(viii). P. R. 29 of 1888.

Instances in the *mohalla*.

Instances in neighbouring *mohalla*.

Homogeneity of religion of inhabitants.

(ix). P. R. 48 of 1888.

Several previous cases in *guzar*.

(x). P. R. 165 of 1888.

Evidence of existence in neighbouring *mohalla*.

Mohalla itself small and no instance of claim being refused.

FOR

AGAINST.

(xi). P. R. 199 of 1889.

2 cases decided in Chief Court previously.

(xiv). P. R. 42 of 1891.

General custom in town.

(xiii). P. R. 108 of 1895.

Purchasers in purchasing took precautions to prevent pre-emptors stepping in, *e. g.*, by getting some pre-emptors to sign deed and paying off others.

1 instance in same *mohalla* where vendees in this case actually bought larger property including garden.

(xiv). P. R. 90 of 1901 (*re shop*).

2 cases of houses, 2 of shops in town.

(xv). P. R. 42 of 1903 (*re building site*).

1 instance of house after contest decreed in *mohalla*.

2 of shops in adjacent *mohalla*.

1 instance of houses, sites and shops in *mohalla* where custom found, but superior right found unproved.

1 case of admission *re shop* in sub-division.

1 case where vendee recognized custom *re house* in *mohalla* by issuing notice on pre-emptors.

1 Chief Court ruling *re site* in adjacent *mohalla*.

2 Chief Court rulings *re houses* in other part of city.

(xvi). P. R. 44 of 1903.

6 cases in lower Courts where right admitted or found in other *mohallas*.

2 similar cases in this *mohalla*.

(xvii). P. R. 52 of 1903.

3 cases where custom held to exist in the *mohalla*.

(xviii). P. R. 42 of 1905.

7 previous decisions in favour of which 6 were based on admissions.

(xix). P. R. 71 of 1905.

General in town.

2 cases in *mohalla* in centre of which this *mohalla* was situate, and out of which it had been created.

No cases in particular *mohalla*, which was however not a sub-division.

Non-existent in another *mohalla*.

2 cases where right to pre-empt *sarai* dismissed.

Several cases of sales of sites without claim in *mohalla*, absence of claim being due to devastation of possible pre-emptors' property by fire.

2 cases were disallowed in other *mohallas* by lower Courts.

1 instance against custom in other *mohalla*.

FOR

AGAINST.

(xx). P. R. 88 of 1905.

In first court only asserted that the plaintiff did not possess the qualifications necessary to allow him to exercise the right of pre-emption, and case was fought out on this ground.

On appeal desired to urge there was no custom at all, but was not allowed to do so.

(xxi). P. R. 38 of 1906.

2 cases of private assertion and recognition in the *mohalla*.

1 decided case based on fact that custom existed in neighbouring *mohallas*.

Oral evidence of existence.

Act of vendee making sale assume the form of a mortgage.

No rebutting evidence.

(xxii). P. R. 42 of 1906.

3 cases of general existence in city and other suburbs.

1 case of non-existence in other suburb.

1 contested case deciding its existence in the locality.

5 cases of admission, 1 *ex-parte* in subdivision.

(xxiii). P. R. 57 of 1906.

General existence in city and suburbs.

1 case of compromise and 3 of admission in locality.

Oral evidence asserting existence.

(xxiv). P. R. 81 of 1906.

General custom in city.

1 Chief Court instance, *viz.*, (xx) above.

(xxv). P. R. 99 of 1906.

Cases establishing right in city generally and adjoining *mohallas*.

No Court case of *mohalla*.

Instances in *mohalla* where right asserted and agreed to without suit.

(xxvi). P. R. 113 of 1906 (case *re* warehouse).

Previous Chief Court case *re* shops.

Previous compromise decree *re* shops.

Present vendor had himself asserted existence in other cases, and on strength thereof got transfer to self.

Case showing it existed *re* house.
All in same *mohalla*.

FOR

AGAINST.

(xxvii). P. R. 120 of 1906.

Numerous cases showing general existence in the city.

1 case in same *kucha* unappealed against.

(xxviii). P. R. 140 of 1906.

Found to exist in *mohallas* on both sides.

4 cases in *katra* itseif, 1 *ex-parte*, 1 plea not pressed, 2 compromised.

No case of claim failing.

(xxix). P. R. 6 of 1907.

2 cases in *mohalla* where custom found, 1 on admission, 1 after enquiry.

Several sales in *mohalla* passing unchallenged.

13 cases in adjacent *mohallas*.

(xxx). P. R. 7 of 1907.

2 instances in *mohalla* found by Court.

5 similar cases in adjoining *mohalla*.

(xxxi). P. R. 16 of 1907.

5 cases in favour in lower Courts.

1 case showing proximity, not contiguity, gives no right.

1 case on arbitration.

(xxxii). P. R. 26 of 1907.

9 cases in *mohalla*, 6 after enquiry, 3 on confession.

(xxxiii). P. R. 67 of 1907.

2 cases in *mohalla* itself, 1 on award, 1 on compromise.

Several cases in neighbourhood.

No case where pre-emption claimed and refused.

(xxxiv). P. R. 122 of 1907.

Several cases in *mohalla* where right affirmed.

Several similar cases in other *mohallas*.

(xxxv). P. R. 35 of 1908.

3 instances in neighbouring streets.

General custom in city.

(xxxvi). P. R. 116 of 1908.

General existence in city.

3 clear cases in locality.

FOR

AGAINST.

(xxvii). P. R. 147 of 1908.

General existence in city.

1 case of admission in *mohalla*.

(xxviii). P. R. 32 of 1909.

2 successful cases in adjoining *mohallas*.

3 successful cases in this *mohalla*, 1 after contest, 1 *ex-parte*, 1 on admission.

Purchaser mentioned existence of custom in his deed.

(xxix). P. R. 96 of 1910.

2 cases after contest.

2 cases on admission.

1 case on compromise arranged by arbitrator.

(xl). P. R. 22 of 1911.

Notice by vendor on pre-emptors saying they might buy.

6 judicial decisions of existence.

(xli). P. R. 61 of 1912.

4 decided cases after contest.

5 cases in which right admitted.

B.—In the following cases the custom was found not to exist on the evidence stated :—

FOR

AGAINST.

(i). P. R. 55 of 1880 (shop).

For 50 years no instance of exercise of right, though many sales.

1 suit dismissed.

Mixed population and consequently no special motive to exclude.

(ii). P. R. 46 of 1882 (shop).

On 1 or 2 occasions would-be purchaser withdrew on hearing there was a claimant for pre-emption.

No case ever brought into Court, and, though several sales, no successful assertion of right.

(iii). P. R. 69 of 1884 (based on proximity).

2 cases of pre-emption allowed on relationship, but no question of custom raised or enquired into.

1 case on relationship, 1 on vicinage dismissed in default, but evidence to show claim admitted by the vendee giving up house out of Court.

1 case based on relationship compromised.

Oral evidence doubtful.

(iv). P. R. 192 of 1888.

1 instance out of Court where right asserted and admitted.

No instances in Court.

(v). P. R. 17 of 1889.

2 decided cases against.

FOR

AGAINST.

(vi). P. R. 170 of 1889.

5 cases in adjoining *mohalla* in which no enquiry made, and the right was admitted or taken for granted.

Vague oral evidence.

No instance in *mohalla*.

(vii). P. R. 33 of 1890.

2 cases in other *mohalla* supporting entry in *Riwaj-i-am* not distinguishing between houses and land.

1 case in other *mohalla* against.

(viii). P. R. 68 of 1890.

Only 2 cases of admission out of Court.

(ix). P. R. 100 of 1892.

1 instance of claim, which was however withdrawn.

Several instances of sale without pre-emption being enforced.

(x). P. R. 85 of 1893.

Oral evidence unsupported by instances.

Evidence of custom elsewhere.

1 case on compromise.

(xi). P. R. 17 of 1895 (*re* shop).

Claim admitted in previous case *re* house with shop in corner.

2 decided cases *re* houses in locality.

1 decided case of house with shop on part of upper storey.

Several sales of shops without assertion of right.

2 previous sales of this property without assertion of right.

(xii). P. R. 17 of 1896.

In other *mohallas* of town early cases allowed.

No instance in this or adjoining *mohallas*.

In other *mohallas* of town later cases disallowed.

(xiii). P. R. 74 of 1897.

Admitted in one case it existed in quarter close by.

1 case of sale in which vendee and claimant both asserted preference.

Admitted did not exist in another quarter close by.

Several cases of sales passing unchallenged.

(xiv). P. R. 70 of 1897.

Found to exist in adjoining *mohalla* in 1893.

1 instance only in *mohalla* against which no appeal was filed.

Locality of recent growth showing that there could be no old custom here.

(xv). P. R. 21 of 1900.

1 contested case decreed at distance on urban rules, the present claim being on rural rules.

1 uncontested case recently decreed.

1 Chief Court ruling opposed to claim.

(xvi). P. R. 58 of 1900 (*re* shop).

1 case of house allowed *re* house in *katra*.

4 cases of shops in other *katra* allowed, 1 on relationship, 2 on contiguity and 1 on proximity.

1 house allowed under award in *katra*.

FOR

AGAINST.

(xvii). P. R. 61 of 1901.

Several cases of compromise and admission,

(xviii). P. R. 83 of 1901 (*re* shop).

2 cases in adjoining quarters only.

(xix). P. R. 86 of 1901.

2 cases of *mohalla* supporting but resting on special circumstances, none of which went to Chief Court.

Instances in adjoining *mohallas*.

(x). P. R. 16 of 1902.

Some successful cases in town, 1 by Tahsil-dar in 1869, 1 in 1876 on basis of *tai zamini*, 1 in 1887 on basis of relationship, 1 in 1890 on erroneous view of law, 3 later on compromise.

(xvi). P. R. 70 of 1902.

(xii). P. R. 71 of 1902.

Some cases in other *mohallas*.

(xviii). P. R. 17 of 1903.

2 oral witnesses who could give no instance.

1 case disposed of on compromise and 1 on other point.

(xxiv). P. R. 6 of 1905.

2 cases in *mohalla* where pre-emption granted, in both custom being presumed to exist.

6 cases in adjoining *katras* where decreed.

(xxv). C. A. 1165 of 1905.

1 case in *mohalla* decided on Muhammadan law.

5 cases in other parts of town, 4 being on admission.

(xxvi). P. R. 13 of 1907 (*re* shop).

1 case where asserted in judgment parties admitted right.

1 Chief Court case of other *mohalla*, and 1 of this *mohalla re* house.

2 cases of other *mohallas* on compromise.

(xxvii). P. R. 54 of 1907 (*re* shop).

1 instance of Munsiff's decree.

2 cases where tenements were partly dwellings, partly shops.

(xxviii). P. R. 68 of 1907.

3 cases in lower Courts, 1 in which there was no enquiry, 1 summarily disposed of, 1 compromised.

Some cases negating right.

No ruling of Chief Court in favour.

3 cases of *mohalla* opposed, 1 of which was decided in Chief Court.

1 contested case dismissed.

General history of town against assumption that custom had grown up.

Town small.

1 case decided by Divisional Judge against right.

1 case against in this *mohalla*,

2 cases in other *mohalla* against.

Several cases of sales passing unchallenged.

1 Chief Court case against it in *mohalla*, and 1 Divisional Court case.

1 case *re* shop, 1 *re* house in other *mohalla*.

2 Chief Court rulings against custom in this *mohalla*, 1 *re* other *mohalla*.

1 Chief Court ruling against.

FOR

AGAINST.

(xxix). C. A. 264 of 1908.

1 case decided by arbitration.

1 case on admission.

1 case following the first mentioned.

(xxx). P. R. 9 of 1909.

1 instance in sub-division only.

1 Chief Court case against.

(xxxi). P. R. 19 of 1902.

(xxxii). P. R. 84 of 1910.

New suburb.

1 case compromised in part.

1 case re agricultural land.

(xxxiii). P. R. 91 of 1911.

Vague oral evidence.

One summarily decided case.

One case of compromise.

(xxxiv). P. R. 29 of 1912.

1 instance in 1885 decreeing.

2 alleged instances in 1865.

Several sales without claim; no decree since 1885.

(xxxv). P. W. R. 139 of 1911.

1 instance on admission in another *mohalla*.

CHAPTER VI.

PROPERTY AND TRANSACTIONS SUBJECT TO PRE-EMPTION.

1. Property subject to pre-emption.
2. Property not subject to pre-emption.
3. Period for determining nature of property.
4. Size of property does not affect question of liability to pre-emption.
5. Transactions subject to pre-emption.
6. Transactions not subject to pre-emption.
7. Power of Court to determine if a particular transaction is a sale.
8. Principles for determining if a particular transaction is a sale.
9. Power of Court to determine if ostensible sale is a sale or not.
10. Transactions held to be or not to be sales—
 - (1) Ostensible Mortgages ;
 - (2) Ostensible Exchanges ;
 - (3) Ostensible Gifts ;
 - (4) Ostensible Lease ;
 - (5) Compromise on foreclosure.

CHAPTER VI.

PROPERTY AND TRANSACTIONS SUBJECT TO PRE-EMPTION.

1. The present chapter deals with property subject to pre-emption and with transactions affecting such property to which the law of pre-emption is applicable.

Under the present Act, the following property alone is subject to pre-emption :—

(a). Agricultural land, wherever situated, otherwise than in a cantonment, even where, as in Mozang, the property has been bought for building purposes. (P. W. R. 61 of 1909).

(b). Village immoveable property, *i. e.*, immoveable property within the limits of a village (under Act II of 1905, village site).

(c). Immoveable property within the limits of a town or a sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division at the time of the commencement of this Act.

(d). Agricultural land situate within a cantonment to which the Local Government under section 8 (1) may declare the right to exist by notification.

(No notification has, up to the present, been issued under this section).

2. The right does not extend to :—

(a). Any immoveable property within any cantonment other than agricultural land notified under section 8 (1), even when the cantonment is notified as a town (P. R. 9 of 1911, in respect to Rawalpindi City and Cantonment).

(b). Any immoveable property situated in any other local area which the Local Government may, by notification, specify.

(The local areas so notified, and the property situate therein, are given in Appendix IV).

(c). Any land or property or class of land or property exempted by the local Government under section 8 (2), Act I of 1913 (this provision did not exist under Act II of 1905).

(d) Shops, *serais*, *katras*, *dharmshalas*, mosques or other similar building, wherever situate.

(Under Act II of 1905 the restriction as to these properties was limited to property in towns).

The meaning of the terms employed above will be found in the Chapter on Definitions.

3. The nature of the property has to be determined with regard to the time of sale only.

P. R. 22 of 1911.

It is the character of the property sold at the date of sale, which determines the applicability of section 13 (2) Act II of 1905, and the pre-emptor's right to pre-empt a house is not affected by a subsequent conversion thereof into a *dharmshala*,

4. It should be noted in regard to property that the mere size of the property sold does not affect the question whether or not the right of pre-emption extends thereto.

(i). P. R. 108 of 1895.

Plaintiff sued to pre-empt in respect of a sale of a large property, called and originally used as a *tawela*, in Moh Gali Kasim Jan, Delhi, consisting of an extensive plot of land and enclosed by walls and buildings on four sides with an open space in the middle, the claim being based on plaintiff's ownership of a small house adjoining on a portion of one side.

Held, the property having been originally built and used as a *tawela*, the right of pre-emption, which admittedly prevailed as to houses in the *mohalla*, presumably attached to it. The mere largeness in size of a property is not of itself sufficient ground for holding that the ordinary rules of pre-emption do not apply, nor does the relative smallness of the property by virtue of which the plaintiff institutes his suit militate against his claim.

(ii). P. R. 32 of 1899.

Pre-emption was allowed of a dwelling house and a row of shops in Billamaran, Delhi.

(iii). P. R. 111 of 1906.

Plaintiff's right of pre-emption, if he has one, will not be affected by the mere size of the property in dispute.

(iv). P. R. 27 of 1897.

A whole village is as much liable to pre-emption as a portion thereof.

(v). XXXIII All. 28.

A right of pre-emption may subsist in relation to villages equally with houses, gardens and small plots of ground.

Contra :—

(i) P. R. 64 of 1887, Burney, J :—

It is clear that the claim to exercise the rights of pre-emption as regards a large property differs from a claim as regards an individual house, and, though it may sometimes be desirable to keep a disagreeable neighbour out of large property as it is for a small one, it can hardly be contended that the principles on which the law of pre-emption is based would ordinarily apply when many houses, inhabited by people of different occupations, are sold together. To establish his claim, plaintiff must prove that, when whole *katras* have been sold, pre-emptors have succeeded in acquiring the entire bargains for themselves.

Plowden, J :—

It is one thing to grant a privilege to a householder for the purpose of excluding from an adjacent building an objectionable neighbour, and another to grant him the privilege of acquiring a large collection of buildings that may be occupied as dwelling houses or shops by distinct and various inmates.

(ii). P. R. 103 of 1889.

The property sold, situate in Jahannuma, Delhi, was a large area of building land with only a number of scattered thatches and kaccha buildings on it, and plaintiff had, or claimed to have, 5 shops and a small site adjoining in one corner.

Held, referring to 64 of 1887, that, even if vicinage gives a right to pre-empt houses, it does not follow that it gives it to shops or other plots extending far and wide away from the property through which the right of pre-emption is claimed.

The same conclusion that mere size will affect the right of pre-emption is, perhaps, deducible from P. R. 90 of 1909 F. B. where the majority in opposition to Chevis, J., decided that when a block of houses is sold, the whole block is not pre-emptible by the person who had a house contiguous to one in the block but that he could only pre-empt the actual contiguous house. [p. 61]

5. The following transactions are subject to the pre-emptive right :—

(1) Sales of agricultural land and immoveable property within the limits of a village (sections 4 and 6, Pre-emption Act.)

Note :—

Under the old law, where custom had to be proved or was presumed to exist, the right to pre-empt houses in the *abadi-deh* was found to exist in the case of sales in P. R. 78 of 1881, 40 of 1883, 1 of 1885, C. A. 269 of 1902, P. R. 65 of 1903, and 51 of 1907, though, in P. R. 85 of 1893, it was held that a non-proprietary resident in a village, claiming pre-emption of a house in the *abadi* on the ground of vicinage, must prove affirmatively that he had the right by the custom of the

village. In P. R. 99 of 1900 it was held that, if a village was held on ancestral shares, the same law would apply to house property as to land.

Sales of shops in villages were pre-emptible under Act II of 1905.

P. R. 80 of 1907.

The Punjab Pre-emption Act of 1905 (section 13 (2)) is inapplicable to shops in villages. The custom of pre-emption exists in respect to such shops subject to the provisions of section 12,

but are not now.

(2) Foreclosures of the right to redeem immoveable property within the limits of a village,

section 4.

(3) Sales and foreclosures of the right to redeem immoveable property within the limits of a town or a sub-division thereof, when a custom is proved to have been in existence at the time of the commencement of the Act.

The sections confining the operation of the right of pre-emption to sales and certain foreclosures is in strict accord with Mohammedan law, and is a departure from the old tribal or customary law, under which the custom could be proved with reference to any kind of transfer. This view of the Mohammedan law is promulgated in

(i), V All. 65.

The rule that sale is an essential condition precedent to the operation of the right of pre-emption is a well-established principle of Mohammedan law.

(ii). VII All. 258.

Mahmud, J:—

Mohammedan jurisprudence limits the exercise of the right of pre-emption strictly to cases of sale, but the village communities in India have extended it to mortgages and even to *thika* leases.

(iii). P. R. 4 of 1869 ; P. R. 98 of 1868.

The right of pre-emption ordinarily attached only to permanent transfers of land, and not to mortgages.

An interesting case showing the effect of this limitation is that of P. R. 82 of 1908, which arose owing to the illegal action of a Court allowing a compromise between a mortgagor, not entitled to acquire land, and a mortgagee, whereby something akin to a sale was substituted for the mortgage.

P. R. 82 of 1909.

One L. mortgaged his agricultural land by way of conditional sale to B. D. B. D. had notice issued on L under Regulation XVII of 1806, the year of grace expired on 5th June 1901. In 1905 B. D. sued for possession, and

the claim was contested by L, but a compromise was arrived at, and it was agreed that the land should remain in possession of the mortgagee B. D., and that, if L failed to redeem within 2 years on payment of the mortgage debt and costs, the mortgagee should, on the expiration of that period, be deemed to be absolute owner of the land. The Court passed a decree in conformity therewith on 3rd March 1905. The mortgagor failed to redeem the land within the said period and the plaintiff sued to pre-empt.

Held, (1) if the said decree conferred on the mortgagee no more extensive rights than that of a mortgagee, the plaintiff's suit must fail, as the Punjab Pre-emption Act of 1905 does not recognize the right of pre-mortgage;

(2) if the mortgagee, by virtue of the decree became entitled, after the expiry of 2 years to absolute ownership the plaintiff's suit must also fail, as, in that event, he must be taken to be suing for pre-emption in respect of a transaction which amounts to a foreclosure of the mortgagee's right to redeem the land, and, under section 4, Punjab Pre-emption Act, no right of pre-emption arises on the foreclosure of a right to redeem in respect of agricultural land.

(4). Sales of occupancy rights under section 6, Tenancy Act, even to a landlord.

P. R. 36 of 1912.

6. The right of pre-emption does not extend to—

(1) sale in execution of a decree for money or order of a Civil, Criminal or Revenue Court, or of a Revenue Officer (section 3 (5)).

For definition of "decree for money or order" see Chapter III, Definitions (p. 65)

The words "for money" are an introduction in Act I of 1913.

The effect of this section is to exclude from transactions liable to pre-emption under the Act compulsory sales under orders of Court. The provision is a departure from the old law.

Under the old law in the Panjab, sales in execution of a decree were expressly made subject under section 9, Punjab Laws Act to the right of pre-emption, and instances of its exercise are to be found in P. R. 34 of 1875, 78 of 1881, 1 of 1885, 121 of 1888, 165 of 1888, and 9 of 1903, while in P. R. 7 of 1876 the right was conceded, but was lost on the ground of estoppel.

It should, however, be noted that the right to pre-empt such sales existed in virtue of an express legislative conferment of the right, and apart from such legislative conferment, as a matter of Mohammedan law, the right in respect to compulsory sales made under the order of Court has been held by the Calcutta and Allahabad Courts not to exist.

The rulings to this effect, which are only of academical interest, are N.W.P.S.D.A. 1854, p. 40, N.W.P.S.D.A. 1855, p. 537, N.W.P.S.D.A. 1860, p. 194, N.W.P.S.D.A. 1863, Vol. I, p. 215, N.W.P.S.D.A. 1865, p. 139, XIII All. 224, I All. 272, X.W.R.C.R. 165, I.B.L. R.A.C 105, XV W.R.C.R. 455 I Marshall 555, II Hay 6

It has however to be noted that under section 2 (2) it is laid down that nothing in this Act shall affect the provisions of Order XXI, rule 88 of the Code of Civil Procedure which reads :—

“Where the property sold (in execution of a decree) is a share of undivided immoveable property, and two or more persons, of whom one is a co-sharer, respectively, bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.”

Accordingly, by virtue of this section, when the property sold in execution of a decree of a Civil Court is joint undivided immoveable property, a co-sharer therein can pre-empt the share of another co-sharer.

The reasons attached to the Bill of 1905 show why sales in execution have been excluded from the ordinary pre-emption law.

It is there stated that “sales of agricultural land, in execution of a decree, are comparatively rare, and as such sales are publicly conducted there appears to be no reason why the pre-emptor’s right to bid should not be deemed sufficient to meet his claims. Where the bid of a co-sharer is the same as that of an outsider, an adequate provision is afforded him by section 310, C. C. P.”

This “adequate protection,” however, it should be noted, does not exist where the compulsory sale is made by order or decree of Court other than a decree of a Civil Court.

We may here note the following matters in regard to this exempting section :—

(a). The decree must be a decree of a Civil Court,

I All 277.

No claim arises under section 14, Act XXIII of 1861, which is supplementary to and amends Act VII of 1859, which is purely a Code of Civil Procedure, to pre-empt the sale of a part of a *patti* of a *mahal* in execution of a decree of a Revenue Court.

In this particular case the plaintiff was a co-sharer in the land sold, and was debarred from succeeding to pre-empt because the sale was by a Revenue Court.

(b). The sale must be of a share of undivided immoveable property.

III All. 15.

The provisions of section 310, Act X of 1877 are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights of a mortgagee in such a share.

(c). The sale must be complete by confirmation.

(d). The contest must be between a co-sharer and one who is not, and the co-sharer must be one occupying that status at the time of the

sale (*vide* Retention of the Statutory Qualifications in Chapter IV on Nature of the Pre-emptive Right).

(e). The co-sharer must have bid at the sale, and his bid must be equal to that of the competitor, and the co-sharer cannot come in after the sale and claim to pre-empt at the price paid by the stranger.

(i). II All. 850.

A co-sharer in undivided immoveable property, of which a share is sold in execution of a decree, does not, under section 310, Act X of 1877, acquire the right of pre-emption as against a stranger to whom such share has been knocked down by merely asserting such right at the time of sale, and fulfilling the conditions of sale required by section 306-7 of that Act. He must bid at the sale, and as high as the stranger, before he can acquire a right of pre-emption under that section.

(ii). III All. 827.

The requirements of section 310, Act X of 1877, are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down and offering to pay a sum equal to that bid by the highest bidder. The section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids.

(iii). VIII A. W. N. 208 and XVIII A. W. N. 115. ditto.

(f). No appeal lies under Order XXI, rule 88, C. C. P., merely because the decree-holder is the co-sharer, and as decree-holder, obtains permission to bid, but fails to give the highest bid, but subsequently claims in the sale to pre-empt as co-sharer and is allowed to do so at the price offered by a stranger.

(i), III All. 674.

A share of undivided immoveable property was put up for sale in execution of a decree, and was knocked down to M. Before it was knocked down to him, A, the decree-holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to M, claiming the right of pre-emption. The Court executing the decree subsequently made an order confirming the sale of such share in favour of A. M appealed, impugning the propriety of the confirmation of the sale in favour of A. Held, that such appeal would not lie, as there is no appeal against an order under section 310, C. C. P.

(ii). V All. 42.

A person claiming to be a co-sharer in certain undivided immoveable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed it might be confirmed in his favour with reference to section 310, C. C. P. The Court disallowed the objection and confirmed the sale in favour of the auction-purchaser.

The objector then applied to the High Court for revision under section 622, C. C. P. Held, that having been allowed to object to the confirmation and treated as a party to the proceeding held therein, he could make such application, notwithstanding he was not one of the persons mentioned in section 311 C. C. P.: that there being no appeal in the case, so far as he was concerned, the High Court could entertain the application under section 622, C. C. P., but as he was not one of the persons competent to avail himself

of the provisions of section 311, C. C. P., he had no *locus standi* to apply to the lower Court, and therefore his application for revision should be dismissed.

(g). The remedy of a purchaser aggrieved by the order of a Court selling in favour of an alleged co-sharer is by suit for declaration and not for possession.

I ALL. 272.

Plaintiff had bought in execution of a decree and defendant as pre-emptor claimed to take the share. The Court auctioning confirmed the sale in defendant's favour, but the Lower Appellate Court held defendant had no preferential right.

On a suit by plaintiff for a declaration that he was entitled to the share, held that plaintiff had priority of purchase, and on special appeal it was urged that the suit was not maintainable, but it was held that he was entitled to get a declaration that the defendant has no right of pre-emption as against him, and that the sale to defendant was invalid, but that he could not get possession until the sale in his favour had been confirmed and the sale made absolute.

(2). Foreclosures of the right to redeem agricultural land (Section 4).

(i). P. R. 87 of 1906.

Under the Punjab Pre-emption Act of 1905 a conditional sale of agricultural land is not a subject of pre-emption.

(ii). 30 of 1907.

There is no right of pre-emption of conditional sales under the Punjab Pre-emption Act even when such right accrues before the Act was passed.

Under section 10, Land Alienation Act, future foreclosures cannot arise as *baibilwafas* are abolished, and the prohibition therefore only affects such alienations as were made before 8th June 1901. Such prior alienations made by members of agricultural tribes, and not already made absolute, are dealt with under section 9 of the same Act.

(3). Sales made by or to the Government, or by or to any local authority, or to any Company under the provisions of Part VII of the Land Acquisition Act, 1894.

For definitions of the terms Government, Local Authority and Company, see Chapter III, Definitions.

It should be noted, though the terminology of the section is obscure, that all sales, whether under the Land Acquisition Act or not, made by or to Government or a local authority are exempt from pre-emption, but sales made to a Company under the said Act are the only sales in which a Company is concerned that are so exempt.

This is an entirely new provision, as under the old law sales by and to Government were liable to pre-emption.

Instances will be found in P.R. 80 of 1888, N.W.P.H.C.R. 1866, p. 88, and N.W.P.H.C.R. 1869, Part II, p. 35.

(4). All sales sanctioned by the Deputy Commissioner under section 3 (2), Punjab Land Alienation Act, 1900.

This is a new provision in the Act of 1913, the object being to prevent claims for pre-emption being made, where, after enquiry, the Deputy Commissioner is satisfied that the sale is one for necessary commercial or similar expansion.

(5). Any sale or class of sales which the Local Government may exempt under section 8 (2) Act of 1913.

This is an entirely new provision and confers upon the Local Government an extremely wide discretionary power. The section is defective in not specifying when this power should be exercised, and *quære*, whether after a sale has been effected and a pre-emptor has asserted his right, say, by suit, the Local Government could deprive him of his right by a notification.

(6). All alienations other than sales or foreclosures of urban and village immoveable property.

Such transactions are mortgages, gifts, permanent leases, exchanges, dower, sale of mortgagee rights and compromises.

Under the old law, provided custom could be proved, all these transactions were subject to pre-emption.

The following cases show where, prior to the present Act, such transactions were held liable to or not liable to pre-emption.

(a). Mortgages.

Allowed in P. R. 4 of 1869, C. A. 144 of 1873, P. R. 53 of 1877, 49 of 1878, 42 of 1880, 58 of 1885, 103 of 1885, 10 of 1887, C. A. 102 of 1888, P. R. 121 of 1888, 87 of 1894 F. B., 98 of 1894 F. B., 61 of 1890, 70 of 1905.

Disallowed in P. R. 87 of 1867, 98 of 1868, 72 of 1886, 20 of 1885, 64 of 1888, C. A. 1470 of 1899, P. L. R. 85 of 1901, P. R. 33 of 1890, 29 of 1893, 45 of 1895, 46 of 1903, 78 of 1904, and 89 of 1905.

(b). Gifts.

Allowed in P. R. 52 of 1896 on payment of the value of the land gifted to the donee.

Disallowed in XIV All. 333, a gift in *shankalp*.

(c). Permanent Leases other than occupancy rights.

Allowed in XXXIII All. 104 on interpretation of the *Wajit-ul-arz* and nature of the transaction.

Disallowed in

(i). P. R. 43 of 1892.

A perpetual lease does not give rise to a right of pre-emption merely because it is tantamount to a sale, but in the particular case it was held that in fact there was a sale, and not a lease.

(ii). P. R. 136 of 1907.

The creation of occupancy rights by way of permanent lease is not a sale. A transaction by which ownership is not transferred, but is expressly reserved, can in no sense whatever be held to be a sale. It may be a lease if the transfer of a right to enjoy the property for a period or permanently in consideration of price, service, or other thing of value to be rendered periodically or on specified occasions.

(iii). VIII W. R. 106, XXV W. R. 43.

(iv). XV Cal. 184.

Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants a lease of it in perpetuity, the doctrine of pre-emption will not apply.

(d). Exchanges.

Allowed in

(i). VIII All. 626 F.B.

Under Muhammadan Law an exchange equally with a sale is subject to pre-emption. Where the pre-emptors cannot give the thing which the vendor agreed to exchange for, they have the right to obtain the land for an equivalent in money.

(ii). XXXI All. 539.

An exchange gives rise to a right of pre-emption when such right arises on a sale.

(iii). I Agra A. C. 144.

An exchange of property for property is a sale, to which the right of pre-emption attaches.

Disallowed in

(i) P. R. 12 of 1884.

An exchange of one plot of land for another cannot be regarded as a sale so as to give a right of pre-emption under section 9, Punjab Laws Act.

(ii). P. R. 111 of 1885, 29 of 1893, and 97 of 1900 which employ similar language.

(e). Gifts in dower.

Allowed in no case.

Disallowed in

V. All. 65.

When a man on marrying a woman does not fix the amount of dower at a money value, but assigns property to her as her dower, the right of pre-emption cannot have any operation.

(f). Gifts in lieu of dower.

Allowed in

(i). N.W.P.S.D.A. 1864, vol. I, p. 475.

A transfer in lieu of dower is a sale and subject to pre-emption.

(ii). V All. 65.

No impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained amount, and property is subsequently sold in lieu of a part or the whole of such dower. Held also, that where a husband transferred certain property in consideration of a certain sum due by him to his wife as dower, such transfer was a sale, and gave rise to the right of pre-emption.

Disallowed in

(i). P. R. 34 of 1897.

(ii). P. R. 88 of 1901.

A transferred immoveable property worth Rs. 600 in lieu of dower, which was fixed at Rs. 200 and a gold *mohur*, to his wife. Held such a transfer was not a sale, but to a great extent a gift and not liable to pre-emption.

Semble, dower is not a debt due, and so pre-emption does not arise in case of a transfer in lieu of dower.

(iii). P. R. 86 of 1902.

A transfer of immoveable property by a husband to his wife in consideration of her dower must be regarded as a gift by the husband to the wife, and not a sale subject to pre-emption.

(g). Sale of mortgagee rights.

Allowed in

P. R. 121 of 1888 on proof of special custom.

Disallowed in

(i). XX All. 19.

An assignment by a mortgagee in possession of his mortgage gives no rise to pre-emption.

(ii). XXV All. 421.

The assignment of mortgage rights in a share in a village by a co-sharer-mortgagee in possession to a stranger is not a transfer of the mortgagee's *haqiat* in the village, and will not give rise to pre-emption in the absence of an express stipulation in the *Wajib-ul-arz* to that effect.

(h). Compromise whereby a mortgagor of agricultural land is, in a suit by the foreclosing mortgagee for possession after foreclosure proceedings have been completed, given further time to redeem, failing which the ownership will go to the mortgagee.

P. R. 82 of 1909, *vide* p. 224.

7. It should, however, be noted that section 4 expressly reserves to the Courts the power of determining whether an alienation purporting to be other than a sale is in effect a sale.

This provision gives statutory effect to a series of rulings which were to the same effect, viz., *Roe, J.*, in P. R. 64 of 1888, C. A. 394 of 1888, P. R. 117 of 1890, F. B., 29 of 1893, 30 of 1893, C. A. 90 of 1894, P. R. 45 of 1895, 100 of 1895, F. B. 20 of 1899, 78 of 1904, 16 of 1907, C. A. 872 of 1901, and C. A. 283 of 1898.

The contrary view was however expressed in C. A. 2141 of 1882, P. R. 69 of 1885, *Rattigan, J.*, in P. R. 64 of 1888, and *Stogdon, J.*, in P. R. 45 of 1895.

8. In determining whether or not an alienation ostensibly not a sale is in effect a sale, the following principles should be noted:—

(1). The vendor and vendee are perfectly entitled to evade the law of pre-emption by any legitimate means, and the mere fact that they have evolved a form of transaction which achieves that end is not sufficient ground in itself to hold the transaction is a sale.

(i). C. A. 394 of 1888.

A person is entitled to evade the law of pre-emption by all lawful means, and it is quite open to a proprietor to mortgage for an indefinite period, though he would have sold but for the law of pre-emption.

(ii). P. R. 117 of 1890 ditto.

(iii). P. R. 64 of 1888.

There is no law which prevents an owner from so dealing with his property as to avoid the accrual of any rights of pre-emption.

(iv). P. R. 45 of 1895.

It is no fraud on the part of either or both parties to a deed to resort to any legitimate means whereby to defeat the law of pre-emption. The mere fact that the defendants have construed a means of circumventing him does not prove that they have committed fraud.

(v). P. R. 45 of 1906.

In order to avoid a claim for pre-emption it is neither illegal nor fraudulent for a person who desires to acquire a footing in the village to accept a gift of land from one of the proprietors previous to his purchase.

(2). The fact that the terms of an ostensible mortgage are onerous is a matter for consideration, but not conclusive, and an ostensible mortgage may be a sale, although it be without onerous conditions,

For instances, *vide infra*, p. 235,

(i). C. A. 90 of 1894.

It is, I think, open to the Court to hold that an ostensible mortgage is really a sale, purely from the nature of the mortgage itself, *e. g.*, where redemption, though legally permitted, is practically impossible or so onerous that no person in his proper senses and *bona fide* acting for the preservation of his own interests would think of redeeming.

(ii). P. R. 100 of 1895.

The conditions of a mortgage may be intentionally onerous without giving rise to any irresistible presumption that the transfer was intended to be permanent, or they may so plainly exclude any possibility of redemption that the only reasonable inference is that a sale, and not merely a mortgage, was the true intention of the parties.

(iii). P. R. 20 of 1899.

In a case where the parties to a contract have a private understanding that a transaction, ostensibly a mortgage, shall act as a sale, it is not a *sine qua non* that the mortgage-deed should contain onerous conditions. It is well-known that such transactions are likely to be contested, and it is, therefore, not improbable that care will be taken to allow nothing to appear in a mortgage-deed which could excite suspicion, and yet the parties concerned might have a secret undertaking and have so arranged that there should be no option left to redeem the land.

(3). The real criterion is whether the parties to the contract intended that the transaction should be a permanent transfer. If so, it must be held to be a sale.

(2). P. R. 64 of 1888.

Roe, J :—

If the terms of a deed, nominally one of mortgage, be such as to practically put it out of a mortgagor's power ever to redeem or if they prevent redemption for a preposterous time, we are not prepared to say the Courts would not be justified in treating the transaction practically as a sale. The essence of a sale is that an owner parts permanently for a consideration, the essence of a mortgage is that the owner merely pledges as a security for a loan which he intends to repay. The Court should judge of the intention of the parties.

(ii). P. R. 100 of 1895 F. B.

If it is established beyond reasonable doubt that the parties intended a permanent transfer the Court will find it to be a sale, though the deed is in form a mortgage.

(iii). P. R. 19 of 1905.

In order to hold a mortgage to be a sale, we have to find not merely what will be the consequences at the end of the mortgage, but that it was intended at the moment of execution that redemption should never be claimed, and that the property was to finally pass to the mortgagee.

(4). The *onus* is on the plaintiff.

(i). C. A. 90 of 1894.

The *onus* is entirely on the pre-emptor and the evidence he produces must be of a cogent character.

(ii). P. R. 100 of 1895 F. B.

The *onus* in the first instance is on the plaintiff to establish his case.

(5). If there is reasonable doubt the transaction must be upheld.

(i). P. R. 100 of 1895 F. B.

If there is reasonable doubt the plaintiff's case will fail on the ground that he has not succeeded in showing that the deed does not embody the true contract between the parties.

(ii). P. R. 78 of 1904 Ditto.

(6). The statement of the mortgagor is relevant, but not of much weight.

(i). P. R. 45 of 1895.

Any numbers of admissions by the mortgagor, that an ostensible mortgage is a deed of sale, cannot operate to alter its nature.

(ii). P. R. 78 of 1904.

The evidence of the mortgagor is relevant and admissible as regards plaintiff's case, but this admission is not necessarily entitled to much weight, inasmuch as it is a gratuitous statement which would not in any way affect the mortgagor's future interests.

(7). The Court must decide as to the real nature of the transaction upon all available material, including the document itself.

(i). P. R. 45 of 1895.

Roe, J :—

The Court should judge of the nature of the transaction, not merely from the use of any particular word in the deed recording their contract, but from a fair and reasonable view of the nature of the terms agreed upon.

(ii). P. R. 100 of 1895 F. B.

The Court must decide as to the real nature upon all the available material, including the terms of the document itself.

(8). The general tendency is to look with suspicion on transactions where the form of mortgage appears to have been adopted in order to evade pre-emption.

C. A. 817 of 1895, C. A. 872 of 1901.

Transactions, where the form of a mortgage appears to have been adopted with the object of evading a pre-emption claim, must be looked at with great suspicion.

(9). The question is one of fact, and not of law, and consequently no further appeal lies.

(i). C. A. 163 of 1896.

We have not got to consider the legal effect of the document, but merely whether the terms thereof in connection with other evidence furnish grounds for inferring a fact.

(iv). P. R. 36 of 1899.

In a case where the question was whether an ostensible mortgage was a sale, held, that the document being on the face of it one of mortgage, the question that arose was not as regards its proper construction, but rather as to the inference to be drawn from the deed and other evidence, as regards the intention of the parties to the transfer, and that this was a question of fact and not of law, and consequently that no second appeal lay to the Chief Court under section 40 (2), Punjab Courts Act.

(iii). P. R. 16 of 1907.

Whether a deed purporting to be a mortgage is, in fact, a sale is a question of fact and not of law.

(iv). P. R. 45 of 1895.

A further appeal was admitted on the ground that the question was a question of the construction of a document, but when the appeal was heard, the Judge remarked, "I much doubt the correctness of this opinion."

Contra :—

C. A. 288 of 1898.

The construction of the document is a mixed question of law and fact.

(10). The objection to the nature of the transaction should not be entertained when taken for the first time on appeal.

P. R. 20 of 1881. Note.

The Commissioner was right in refusing to entertain the objection that an ostensible sale was a gift when made for the first time on appeal to his Court.

9. The converse rule, that a party to an ostensible sale may prove it was not a sale holds good, except where a deed has been drawn up, when, of course, section 92, Evidence Act, operates to prevent him doing so.

P. R. 61 of 1895.

Where the defendant had admitted there has been a sale, the *onus* is on him to prove there was no sale, but it is not conclusive proof of the fact unless it operates as an estoppel.

10. In the following cases transactions purporting to be other than sales have been held to be or not to be sales :—

(1). Ostensible Mortgages.

(a). Held to be sales.

(i). P. R. 64 of 1888.

Roe, J.—

Obiter dictum. Probably a mortgage for 100 years.

(ii). P. R. 45 of 1895.

Obiter dictum. A mortgage not redeemable for 999 years, and then only on payment of one million sterling.

(iii). P. R. 20 of 1899.

A mortgage deed, unredeemable for 15 years, had no onerous terms except that the charges incurred in clearing a *kassi* should be a charge on the land, while the mortgagee was in possession and drawing the benefits, but the mortgage debt exceeded the value of the land, and there was a *bahi* entry that the mortgagee should never recover except from the land and the mortgagor admitted it was a sale.

(iv). C. A. 872 of 1901.

A mortgage for 40 years, the nominal consideration being very high in comparison with the real value.

(v). P. R. 98 of 1906.

On 19th February 1903 a mortgage was made not redeemable for 32 years, and on 2nd September 1903, the equity of redemption was sold to the same person. The vendee had nowhere expressed an intention of keeping the interests separate.

(vi). P. R. 145 of 1906.

Plaintiff and defendant were equal joint owners of a vacant site in a town. Defendant sold her half to the second defendant. Then plaintiff mortgaged her half to a stranger without interest and redeemable only after 32 years. In the meantime the mortgagee, whose family residence adjoined, was to be entitled to build on the site without let or hindrance by plaintiff, who would not even be allowed to see the building accounts, and on redemption plaintiff must pay the mortgage money, plus all sums spent on the buildings.

Plaintiff sued to pre-empt defendant 1's sale to defendant 2, and defendant urged plaintiff had already sold and had no status to sue. The contention was upheld.

(b). Held not to be sales.

(i). P. R. 64 of 1888.

A mortgage for 40 years, where profits were equal to interest, and interest on the costs of repairs to the property mortgaged was to be added to the mortgage money.

(ii) C. A. 2141 of 1882.

A mortgage for 90 years.

(iii). P. R. 72 of 1886.

The property was not redeemable for $3\frac{1}{4}$ years, interest was to run on in addition to rent, the costs of repairs effected by the mortgagee were to be added to the principal, and there was no proof that the mortgage money exceeded the real value.

The fact that the mortgagee stipulated he should get back the cost of repairs effected by him, together with interest, and that the house should not be redeemed for $3\frac{1}{4}$ years, held, not to be enough to indicate that only a sale was intended.

(iv). 100 of 1895 F. B.

The deed of transfer stated there were previous mortgages for Rs. 6,000—now consolidated in a new mortgage for Rs. 7,000. The mortgage was with possession and for 15 years: interest was at 12 annas per mensem per cent. calculable at 6 monthly rests. Out of the income Government dues were to be

paid first, then interest, which if not paid was to be added to the principal and interest charged thereon. The mortgagees were to have power to effect improvements and charge the cost to the mortgage debt with interest: they were entitled to cut trees for necessary purposes, and there was a *bai bil-wafa* clause if the amount due were not paid in one year after the expiry of the 15 years term.

(v). P. R. 78 of 1904.

In 1891 a mortgage was made favouring the plaintiffs of half of 2,958 *ghumaons*, excluding one plot of 25 *ghumaons*, for Rs. 20,000 for 20 years. All trees planted during mortgage or growing spontaneously to belong to the mortgagees, those existing at time of mortgage to the mortgagor: the mortgagees were to receive any Government compensation, but were to credit same at time of redemption. Later there was a further charge of Rs. 5,000 extending the period to 26 years.

In 1898 a mortgage of Rs. 10,000 was executed in favour of defendants on 772 *ghumaons* out of the whole holding for 40 years: Rs. 5,000 being retained by the new mortgagees to redeem the mortgage of 1891. Interest was to be calculated at 1 per cent. per mensem on Rs. 5,000, and on the whole if the mortgagees failed to get possession from the first mortgagees by redemption. The mortgagee was entitled to make improvements and a garden, the charge thereof to be added to the mortgage debt.

There was a *bai-bil-wafa* clause in case the whole sum was not paid in one year after the expiry of the term of 40 years.

On the same day the defendant-mortgagee bought for Rs. 40,000 the equity of redemption of the area mortgaged to plaintiffs, and also the proprietary rights in the 25 *ghumaons*. He was a stranger to the village who had been trying to get land in the village, and the mortgagor had practically exhausted his interest in the land and resided elsewhere.

(vi). P. R. 19 of 1905.

The mortgage money was considerably in excess of the value of the land, the mortgagors, who were widows, were not personally liable, and interest was to be paid for 20 years whether the land was redeemed in the interval or not.

(vii). P. R. 67 of 1912.

A mortgage for 15 years with power reserved to mortgagee to construct buildings, the cost of which with interest on outlay at 6 per cent. per annum was to be repaid by the mortgagor at redemption.

No interest was charged on the loan, the income being held equal to the interest.

(c) In the following case the facts were stated, but no decision arrived at as to whether the transaction was a sale or a mortgage, it being held, that if it were a mortgage, no custom of pre-emption was proved; if a sale, the suit was time-barred.

P. R. 45 of 1895.

B. mortgaged with possession to T. on 6th August 1888 for 30 years for Rs. 550. Interest on Rs. 150 was to be held equal to the rent, the balance Rs. 400 was to carry interest at 8 annas per cent. per mensem. The mortgagee could make what improvements he liked, and at redemption he could claim the cost with interest. The house at the time was under mortgage to J. from whom T. redeemed in July 1891, and the mortgagor admitted it was a sale.

(2). Ostensible Exchanges.

(a). Held to be sales.

P. R. 29 of 1893.

A permanent transfer of land for Rs. 4,500 *plus* one *ghamaon* of land in another village worth Rs. 40 or 50.

Obiter dictum. Ditto.

A transfer for Rs. 100 and a brass *lota*.

(b). Held not to be sales.

(i). P. R. 111 of 1885.

A plot of land 3 *kanals* 15 *marlas* in area transferred in consideration of another plot 11 *kanals* in area *plus* Rs. 280.

(ii). P. R. 97 of 1900.

A shop worth Rs. 300 transferred in consideration of another shop worth Rs. 250 *plus* Rs. 50 in cash paid in order to balance the values, the two shops being conveyed by separate deeds of sale.

(3). Ostensible Gifts (including dower and *shankalp*).

(a). Held to be sales.

(i). V All. 65.

A transfer after marriage in lien of dower fixed at time of marriage, the amount of dower being an ascertainable sum and a debt due (not applicable in the Punjab).

(ii). P. R. 117 of 1890 F. B.

A transfer of land valued at Rs. 300 in the form of a gift, ostensibly to allow of the construction of a *dharmsala* and a garden, the donees also being allowed to build shops thereon.

The donor was poor, the donee rich; the donor paid the costs of the conveyance; previously the donor had sold land to the donee's father for the purpose of building a temple, and the donee agreed to be responsible in case of anyone objecting.

(iii). P. R. 29 of 1893.

A transfer by A. to B. of a small plot of land in a village in order to give B. the status of owner in the village, two days before A. sold another considerable plot to B., A. being a man in difficulties and B. well-to do.

(iv). P. R. 2 of 1903.

A transfer in consideration of money, a favour and past services.

(v). P. R. 23 of 1906.

An assignment of immoveable property by a maternal uncle to his sister's son for money paid and to be paid by the transferee for the use of the transferor *plus* past services and natural love and affection.

(b). Held not to be sales.

(i). V All. 65.

Assignment of property by a husband at time of marriage to his wife as dower.

(ii). XIV All. 333.

A transfer in *shankalp*.

(iii). C. A. 34 of 1897.

A transfer of property in lieu of dower considerably in excess of the amount of dower in value.

(iv). P. R. 88 of 1901.

A transfer of property worth Rs. 600 in lieu of dower of Rs. 200 and a gold mohur.

(v). P. R. 86 of 1902.

A transfer of immoveable property in lieu of dower.

(4). Ostensible Lease.

See definition of sale "Creation of Occupancy Rights," p. 93.

(a). Held to be a sale.

(i). P. R. 43 of 1892.

The document in suit purported to be a lease in perpetuity granted in consideration of Rs. 700 premium, no rent being reserved, and full powers including unrestricted right of alienation being granted.

(ii). XXXIII All. 104.

Transaction purporting to be a perpetual lease on fine of Rs. 1,436 and nominal rent of Rs. 5-14-6.

(5). Compromise on foreclosure.

XI All. 164.

The conditional mortgagee foreclosed, and on expiry of the year of grace foreclosure proceedings were entered. He then sued for possession, and a compromise was effected whereby he relinquished a portion of the property and retained a portion.

Plaintiff sued to pre-empt the whole foreclosed property.

Held, his right extended only to the property to which the compromise related, inasmuch as he failed to prove that the preliminary proceedings prior to the foreclosure had been complied with.

CHAPTER VII.

STATUTORY QUALIFICATIONS ENTITLING PERSONS TO PRE-EMPT.

1. Only qualifications admissible are the statutory ones.
2. Statutory qualifications and order of preference where given.
3. Statutory qualifications under section 11, Act II of 1905.
4. Statutory qualifications under section 14, Act I of 1913.
5. Statutory qualifications under section 12, Act II of 1905.
6. Statutory qualifications under section 15, Act I of 1913.
7. Notes applicable to sections 11, 12, Act II of 1905, and sections 14, 15, Act I of 1913.
 - (1) Section 12, Act II of 1905, is to be read subject to section 11, and section 15, Act I of 1913, subject to section 14.
 - (2) Aim of the sections.
 - (3) Agricultural land and village immoveable property subject to the same rules.
 - (4) Classification of property.
 - (5) Sections contain the whole law and determine the order of preference.
 - (6) Obsolete qualifications.
 - (7) No difference in variously constituted villages.
 - (8) Person with different qualifications may elect on which to sue,
 - (9) Remedy of landlord under section 5, Tenancy Act, is in the Revenue Court.
 - (10) Entitled to inherit.
 - (11) When section 12 (c) and section 15 (c) operate.
 - (12) Words used in the plural or singular.
 - (13) "Jointly and severally" in sales by co-sharers under Act II of 1905 and section 13, Act I of 1913.

- (14) The absence of the right of Co-emption.
 - (15) Joint and several right in other cases.
 - (16) Landlord's right in respect to occupancy tenures other than under section 5, Tenancy Act.
 - (17) Independent right of a son.
8. Statutory qualifications under section 13, Act II of 1905, and section 16, Act I of 1913.

CHAPTER VII.

STATUTORY QUALIFICATIONS ENTITLING PERSONS TO PRE-EMPT.

1. We have already seen in the Chapter on the Nature of the Pre-emptive Right that the right of pre-emption is a personal right, exercisable by persons possessing certain legal qualifications. These qualifications were under the old law partly customary, and partly statutory, and under the present law they have become entirely statutory.

No qualification is now recognizable as giving a person a right to pre-empt other than those which are specifically mentioned in the Acts of 1905 and 1913.

The Acts also declare the order of preference of these statutory qualifications, so that in cases where the pre-emptor and the vendee, or two rival pre-emptors each possess a statutory qualification, the person possessing the highest placed qualification must succeed.

So too the possession by a pre-emptor of a higher and lower qualification gives no preferential right over a vendee possessing the higher qualification only.

P. R. 87 of 1911.

The fact that a pre-emptor is both a lineal descendant and a co-sharer does not give him superior rights to another lineal descendant of equal degree who is not a co-sharer.

Where the pre-emptor and the vendee have equal qualifications, the pre-emptor must give way to the vendee, as he has no preferential or superior right (see Pre-emptor, page 84), where rival pre-emptors have equal rights, the property is to be disposed of according to the rules given in the Chapter on Division among Equally Entitled Pre-emptors.

2. The statutory qualifications and the order of preference, which is also statutorily fixed, are given in sections 14, 15 and 16 of the Act, and sections 53 and 54 of the Tenancy Act, the provisions of which are specially reserved by section 2 (2) of the Act, the qualifications and order of preference under Act II of 1905 being given in sections 11, 12 and 13 of that Act,

As under section 12, Act of 1913 it is laid down that rights in regard to sales completed before the Act of 1913 are to be judged with reference to the pre-existing law, it is necessary to consider the qualifications under Act II of 1905 as well as under Act of 1913.

Section 11, Act II of 1905 and section 14, Act of 1913 apply only in the case of agricultural land.

Section 12, Act II of 1905 and section 15, Act of 1913 apply in the case of agricultural land and village immoveable property.

Section 13, Act of 1905 and section 16, Act of 1913 apply in the case of urban immoveable property.

Sections 53-54, Tenancy Act apply only in the case of occupancy rights under section 5 transferred by an occupancy tenant.

3. We have now to consider these qualifications in detail.

Section 11, Act II of 1905.

Where agricultural land is sold no person other than a member of an agricultural tribe shall have a right of pre-emption in respect thereto whether the vendor be a member of an agricultural tribe or not.

This general rule has one exception given in the proviso to section 11, *viz.*, where the vendor is not a member of an agricultural tribe a person possessing the whole of the following statutory qualifications may exercise the right of pre-emption or resist a claim to pre-empt brought by another :—

(a) if he is a member of the same tribe as the vendor.

(b) if he is recorded in the Revenue papers as an owner or occupancy tenant of agricultural land in the estate where the property sold is situate.

(c) if he has been so recorded for 20 years previous to the sale either,

(i) in his own name, or

(ii) in the name of any agnate who has previously held his agricultural land.

The following points require notice :—

(1). Subject to the proviso, a person, not being a member of an agricultural tribe, is incompetent to sue for pre-emption of agricultural land.

(i). P. R. 15 of 1905.

As alienations of agricultural land by certain classes of people in the Punjab can now only be made as provided by section 3 (i) Alienation of Land

Act, the provisions of the law of pre-emption, as enunciated in the Punjab Laws Act with respect to such property, have in consequence become in certain cases obsolete, and therefore in a case where a member of an agricultural tribe sold his share in a joint *khata* to a non-proprietor in the village, but who belonged to the same agricultural group as the vendor, and one of the co-sharers in the *khata* comprising the land sold, who was not a member of an agricultural tribe, instituted a suit for pre-emption.

Held, plaintiff's right of pre-emption which he had possessed under the Punjab Laws Act has been abrogated by the provisions of the Alienation Act, by reason of his being neither an agriculturist in the village, nor a member of an agricultural tribe, and that he was not entitled to maintain his suit.

(i). P. R. 7 of 1910.

Since Act XIII of 1901 came into force a person who is not a member of an agricultural tribe cannot sue for pre-emption of agricultural land at all.

(2). The section does not apply to village immoveable property, so, irrespective of the proviso to this section, a member of a non-agricultural tribe possessed of qualifications under section 12 can maintain a suit to pre-empt.

(3). The possession of the statutory qualifications under section 11 will not give a person, who is not a member of an agricultural tribe, any right to pre-empt except in case the sale is by a person of a non-agricultural tribe.

(4). The mere possession of the qualifications under section 11 will not give the holder thereof ground for successfully maintaining or resisting a claim for pre-emption unless also he possesses the qualifications under section 12. That is to say section 11 is not really an enabling section, it declares who cannot exercise the right of pre-emption, viz., all persons except members of an agricultural tribe and such members of non-agricultural tribes who fulfil the conditions of section 11. Being qualified by that section to maintain a suit the claimant or resister must further possess one or other of the statutory qualifications given in section 12, when the subject of dispute is agricultural land.

(5). Conversely where the vendee possesses the statutory qualifications under section 12, but not those under section 11, he has no right of pre-emption and must give way to a pre-emptor qualified under both sections.

(i). C. A. 1445 of 1907.

To defeat the claim of a pre-emptor belonging to an agricultural tribe, the vendee, who is otherwise qualified to purchase, must satisfy the terms of the proviso to section 11.

(ii). P. R. 101 of 1907.

Under section 11, Pre-emption Act, a member of the alienor's tribe has a preferential right of pre-emption in respect of a sale of agricultural land by

a member of an agricultural tribe to that of a vendee who was an agriculturist under section 2 Land Alienation Act.

(iii). P. R. 23 of 1908.

By virtue of sections 11, 12, Pre-emption Act, a member of an agricultural tribe has a preferential right of pre-emption in respect to a sale of agricultural land by a vendor, who is not a member of an agricultural tribe, against a vendee who is a proprietor in the village but does not come within the proviso to section 11.

(6). The section applies to all sales of agricultural land, so a member of an agricultural tribe, possessing any of the qualifications given in section 12, can defeat even a member of the vendor's tribe possessed of the highest qualification under section 12, but not possessed of all the qualifications under section 11.

The result is that a Jat occupancy tenant in the estate can claim to pre-empt agricultural land sold by a *Khatri* to his own brother, who is also a co-sharer in the property sold and has been so recorded for 19 years and 11 months.

The section therefore goes very much further than the Land Alienation Act, which merely laid prohibitions on sales by members of agricultural tribes, except under certain circumstances. Under that Act sales by members of non-agricultural tribes are free from prohibition, but under the Pre-emption Act of 1905 the choice of vendee is not free.

(7). The proviso has no connection with a member of an agricultural tribe, that is to say, if the pre-emptor or vendee is a member of an agricultural tribe, he can, provided he is qualified under section 12 and subject to the provisions of section 26 (1), if he does not belong to the same group of tribes as the vendor, exercise his right without being possessed of the qualifications under section 11.

Those qualifications have only to be possessed when the pre-emptor or the vendee is not a member of an agricultural tribe.

(8). The section is inapplicable to the Simla District, where there are no agricultural tribes. Sales in that district are regulated entirely by section 12.

(9). In respect to (c) above it is not necessary that the pre-emptor should have been possessed of the same land either in his own name or that of an agnate for 20 years. It would suffice if he had been recorded for that period as owner or occupancy tenant of any agricultural land in the estate.

(10). The period of 20 years is to be computed back from the date of the sale, but the pre-emptor must continue to retain his statutory qualification till an adjudication has been come to on his claim, though

the vendee resisting a claim to pre-empt by another need not do so (see Chapter IV, Nature of the Pre-emptive Right).

4. (1). Section 14 of the Act of 1913 replaces section 11 of Act II of 1905. It applies only to agricultural land sold by an agriculturist and whereas section 11, Act II of 1905 placed certain restrictions on pre-emption by non-agriculturists of agricultural land sold by non-agriculturists the present Act abolishes those restrictions.

(2). Under this section agricultural land sold by an agriculturist can be pre-empted only by—

- (a) agriculturists who are
- (b) members of the same agricultural group as the vendor.

(3). As has already been pointed out, under the Land Alienation Act the Local Government has hitherto notified as agriculturists certain tribes in—

- (a) a general district group, and
- (b) in a special limited group (see Appendices F, I A).

An agriculturist gazetted in the special limited group has no power to pre-empt land sold by a member of the district group, he can only pre-empt land sold by a member of his own special limited group if the sale be by an agriculturist.

So too, and this is probably a quite unintentional provision for which there is no political justification, a member of the district group of agricultural tribes cannot pre-empt the sale of agricultural land by a member of the special limited group in that district.

The result therefore of this extraordinary provision, and I think that it is purely unintentional, is that a sale by an agriculturist of the special group cannot be pre-empted by an agriculturist of the district group in preference to a non-agriculturist.

(4). We have now to refer briefly to the position of the non-agriculturist in respect to agricultural land.

Formerly he could only pre-empt agricultural land, if

- (a) it was sold by a non-agriculturist, and
- (b) the vendor was of the same tribe as himself, and
- (c) he was recorded as an owner or occupancy tenant in the same estate as the property sold, and
- (d) had so been recorded for 20 years prior to the sale either in his own name or that of an agnate holding his agricultural land.

Now a non-agriculturist can pre-empt agricultural land

- (a) if it is sold by any non-agriculturist, whether of his own tribe or not, and
- (b) if he holds any of the qualifications under section 15 of the Act.

It is not necessary therefore that the non-agriculturist should, as formerly, hold land in the estate. If he be an heir only, he can succeed in a pre-emption claim.

Unconsciously again no doubt this section gives opportunity for the raising of difficult question of succession among Hindus and Muhammadans, whether governed by personal law or special custom, in pre-emption suits, and accordingly, instead of simplifying, renders more complicated this branch of law.

Another effect of this change is that though a non-agriculturist cannot pre-empt a sale of agricultural land by an agriculturist of the special limited groups, he can, if he be the purchaser of such land, successfully resist a claim to pre-empt made by an agriculturist of the general district group.

He has therefore an opportunity to acquire land from agriculturists of the special limited group which he did not possess under the Act of 1905.

(5). Equally with section 11, Act II of 1905, section 14—

- (a) does not apply to village immoveable property,
- (b) it is inapplicable to Simla district.

5. Having seen that under section 11, Act II of 1905 no person can claim pre-emption except—

- (a) a member of an agricultural tribe,
- (b) a member of a non-agricultural tribe in the circumstances stated in the proviso,

in respect to agricultural land, we may now turn to section 12 of that Act, which lays down the further statutory qualifications which must be possessed by a pre-emptor or person seeking to resist a pre-emptor's claim in respect to agricultural land under that Act. These further statutory qualifications, required when agricultural land is concerned, are the only statutory qualifications required where the subject of sale is village immoveable property.

It should be noted that in order to found a claim for pre-emption or resist a claim it is only necessary to possess one of these qualifications,

and where both parties possess one of these qualifications, preference will be given to the person having the superior qualification, and if both sides are possessed of an equal qualification the right of the vendee must prevail.

Section 12 deals with—

- (a) sales of the proprietary right in a share of agricultural land or village immoveable property, or foreclosures of the right to redeem a share of village immoveable property,
- (b) sales of the proprietary right of the whole of a piece of agricultural land, or village immoveable property, or foreclosures of the right to redeem village immoveable property,
- (c) sales of a share in an occupancy holding by an occupancy tenant,
- (d) sales of the whole of an occupancy tenure by an occupancy tenant or tenants.

It is necessary to distinguish between sales of the proprietary interests in an occupancy tenure, and the sales of the tenant's interest therein, as the rules are slightly different.

In cases under (a), the right of pre-emption is exercisable by the persons possessed of any one of the following statutory qualifications, the qualifications being given in the order of preference.—(P. W. R. 82 of 1909).

- (i). Persons who are the lineal descendants of the vendor in the male line in order of succession.
- (ii). Persons who are co-sharers and agnates in the order of succession.

Where the sale is by a female of property inherited through her husband, son, brother or father, the agnate is the agnate of the person through whom she has succeeded.

- (iii). Persons other than those in (i) and (ii) who, but for such sale would be entitled to inherit the property in the event of the vendor's decease in order of succession.
- (iv). Persons who are co-sharers in the property, the whole body of co-sharers being entitled to pre-empt before any individual co-sharer, other than those mentioned in (i), (ii) and (iii) jointly, and if there be no joint claim each individual co-sharer being entitled.

- (v). Where the sale is of superior proprietary rights, persons who are inferior proprietors in the property, and where the sale is of inferior proprietary rights, persons who are superior proprietors in the property sold.
- (vi). Persons who are owners of the *patti* or other sub-division of the estate within the limits of which the property sold is situate, the whole body of such owners having the prior right, and where the whole body does not enforce its joint right, each individual owner having the right.
- (vii). Persons who are owners in the estate, the right as in (vi) being enforceable first by the whole body and in default by any individual owner.
- (viii). Persons who have rights of occupancy in the property sold, the right being as in (vi) first enforceable by the whole body of such occupancy tenants and in default by each individual.
- (ix). Persons who have occupancy rights in agricultural land in the estate where the property is situate.

In this case there is no joint right, the right being exercisable by each individual tenant.

It should be noted that where there are 3 or more shares in the property sold, and 2 or more shares (the total sold being less than the whole property) are sold, clauses (i), (ii) and (iii) must be interpreted to mean the lineal descendants, agnatic co-sharers or heirs of each co-sharer selling. Thus suppose A, B and C were owners, and A and B jointly sold their two-thirds share, the lineal descendants, etc. of A would be entitled preferentially to pre-empt A's share, and the lineal descendants, etc. of B would be entitled to pre-empt his share. At the same time if the lineal descendants of either A or B were entitled on any later qualification to pre-empt the other share, they would have to frame their suit to pre-empt such.

In the case of (b), whether the property sold was owned by a sole owner or by a body of co-sharers, and the whole proprietary interest was sold, the persons possessed of any one of the following statutory qualifications can exercise the right of pre-emption, the qualifications being given in the order of preference:—

- (i) persons, who, but for such sale, would be entitled to inherit the property in the event of the vendor or vendor's decease in order of succession.
- (ii) as *v*, in (a)
- (iii) as *vi*, in (a)

- (iv) as *vii*, in (a)
- (v) as *viii*, in (a)
- (vi) as *ix* in (a).

In cases mentioned in (c) the right of pre-emption is exercisable by the persons possessed of the following statutory qualifications, the qualifications being given in the order of preference—

- (i) the landlord of the occupancy tenant under section 53, Tenancy Act, when the occupancy tenancy is one under section 5 of the Tenancy Act,
- (ii) as *i*, in (a)
- (iii) as *ii*, in (a)
- (iv) as *iii*, in (a)
- (v) as *iv*, in (a)
- (vi) as *v*, in (a)
- (vii) as *vii* in (a)
- (viii) as *ix*, in (a).

In cases mentioned in (d) the right of pre-emption is exercisable by the persons possessed of any of the following statutory qualifications, the qualifications being given in the order of preference :—

- (i) as *i*, in (c)
- (ii) as *i*, in (b)
- (iii) as *vi*, in (a)
- (iv) as *vii*, in (a)
- (v) as *ix*, in (a).

The terms requiring definition have all been defined in the Chapter on Definitions.

6. Section 15 of the Act of 1913 differs in some points from section 12 of the Act of 1905.

We have seen that section 14 lays it down as a preliminary qualification that when land is sold by a member of an agricultural tribe it can only be pre-empted by a member of the same group.

Subject to this single limitation, section 15 applies to all sales of agricultural land by whomsoever made, and to all sales or foreclosures of village immoveable property.

Section 15 does not divide property into quite the same 4 classes as does section 12, Act of 1905 given on p. 249.

The classes of property dealt with by section 15 are :—

(a). Sales of the proprietary right in a share of agricultural land or village immoveable property or foreclosures of the right to redeem a

share of village immoveable property owned or held jointly, where such sale or foreclosure is made by or against any one or more, less than all, of the co-sharers in the whole of such land or property of which the share sold forms a part.

(b.) Sales of the proprietary right of the whole of some agricultural land or village immoveable property or foreclosure of the right to redeem village immoveable property by or against a sole owner or all co-sharers, and such sales or foreclosures of a share of such property made by or against the whole of the co-sharers.

(c.) Sales of a share in an occupancy tenure by any one or more less than all of the occupancy tenants thereof.

(d.) Sales of the whole of an occupancy tenure by the sole tenant or the whole co-sharing tenants and the sale of a share of such tenure made by the whole of the co-sharing tenants.

In all cases of pre-emption, wherever any class or group of persons is entitled to pre-empt, the right may be exercised by either all jointly, or any two or more jointly or any one individually under section 13.

In the case of (a) the right to pre-empt vests in the following persons in the order of preference given :—

(i). Persons who are the lineal descendants whether male or female of the vendor in the order of succession.

(ii). Persons who are co-sharers and agnates of the vendor in the order of succession.

Where the sale is by a female of property held by her on a life tenure inherited through her husband, son, brother or father the agnate is the agnate of the person through whom she has succeeded, but where she has inherited through such persons a full estate, the agnates are her agnates, *i. e.*, her father's or her brother's agnates alone.

(iii). Persons other than those in (i) and (ii) who, but for such sale would be entitled to inherit the property in the event of the vendor's decease in the order of succession.

(iv). Persons who are simply co-sharers in the property.

(v). Where the sale is of superior proprietary rights, persons who are inferior proprietors in the property sold, and where the sale is of inferior proprietary rights persons who are superior proprietors in the property sold.

(vi). Persons who are owners in the *patti* or other sub-division of the estate within the limits of which the property sold is situate,

(vii). Persons who are owners in the state within the limits of which the property is situate.

(viii). Persons who have occupancy rights in the property sold.

(ix). Persons who have occupancy rights in the estate where the property is situate.

The same note applies to this section as to section 12, Act of 1905 given on p. 250.

In the case of sales under (b) the persons entitled to pre-empt are:—

(i) persons who, but for such sale, would be entitled to inherit the property in the event of the vendor or vendors' decease in order of succession,

(ii) as (v) in (a)

(iii) as (vi) in (a)

(iv) as (vii) in (a)

(v) as (viii) in (a)

(vi) as (ix) in (a)

In the case of sales under (c) the right vests in

(i) the landlord of the occupancy holding, if it be held under section 5, Tenancy Act, under section 53, Tenancy Act,

(ii) as (i) in (a)

(iii) as (ii) in (a)

(iv) as (iii) in (a)

(v) as (iv) in (a)

(vi) as (v) in (a)

(vii) as (vi) in (a)

(viii) as (ix) in (a)

In the case of sales under (d) the right vests in—

(i) as (i) in (c).

(ii) as (i) in (b).

(iii) as (vi) in (a).

(iv) as (vii) in (a).

(v) as (ix) in (a).

7. Notes on sections 11 and 12, Act II of 1905, and sections 14 and 15, Act of 1913, Punjab Pre-emption Act II of 1905.

Section 12, which replaced section 12 of the Punjab Laws Act determines, as we have seen, the order in which persons entitled to pre-emption in agricultural land and village immoveable property can exercise that right under that Act, and section 15, Act of 1913 reproduces

with some alterations the law contained in section 12, section 14 of the present Act completely altering the law contained in section 11.

Under the Panjab Laws Act, as explained in the explanatory notes to the Bill of 1905 when introduced, pre-emption in villages was an artificial means whereby the integrity of the village was assured.

But that law merely regarded the village as it stood, without any great regard to its historical foundation, inasmuch as it gave all co-sharers a similar footing subject to the proof of some special custom. Consequently under the general law, that is where no special custom was proved, an agnate of the vendor, merely as such, had no special preference over a non-agnate, even if the agnate was a son of the vendor, and the family or tribal tie which underlay the whole scheme of pre-emption, as it does other restrictions on the power of alienation, was lost sight of.

In numerous cases by special custom the right of relationship had been recognized as conferring a special claim, but still that special custom had to be proved.

It is interesting to note the variability of the existence or non-existence of the rights of relationship under custom.

In the following cases relationship was held to confer a right by custom :—

P. R. 61 of 1876 (Amballa), 151 of 1879, 56 of 1882 (Lahore), 114 of 1882 (Hissar), 40 of 1883 (Amritsar), 114 of 1884 (Lahore), 58 of 1885 (Amballa), 87 of 1895 (Lahore), 45 of 1897, 73 of 1901 (Dera Ghazi Khan), 65 of 1903 (Rohtak), 17 of 1905 (Dera Ghazi Khan), 35 of 1905, 70 of 1905 (Hoshiarpur), 87 of 1905 (Rawalpindi), and 12 of 1908 (Sialkot),

while in the following cases relationship conferred no right :—

P. R. 54 of 1880, 82 of 1880, 16 of 1881 (Jhang), 11 of 1884 (Karnal), 69 of 1885 (Lahore), 30 of 1887 (Jullundur), C. A. 350 of 1887 (Lahore), 44 of 1892 (Amritsar), 27 of 1893 (Ludhiana), 89 of 1900 (Multan), 64 of 1903 (Gordaspur), and P. W. R. 7 of 1907, (Jullundur).

No doubt in villages held on ancestral shares relationship did confer a right subsequent to that of co-sharers in the holding, but even so such relations had to be co-sharers in the village.

The Acts of 1905 and 1913 aim first at re-establishing the family or tribal basis of the village, when that fails they aim at preserving the integrity of the village as it stood at the time the Acts were passed, and when that again fails they aim at securing the land to agriculturists, this last aim being not so strictly secured when the land sold was not that of an agriculturist.

We may now tabulate certain points which are noteworthy in respect to section 12, Act II of 1905, and section 15, Act I of 1913 :—

(1). The whole of section 12 when applied to agricultural land is to be read subject to the provisions of section 11, which limits the right of pre-emption to members of an agricultural tribe and certain other specified persons who do not belong to an agricultural tribe.

Consequently no person who may fulfil the conditions of section 12, Act of 1905, has any right to pre-empt agricultural land under that Act unless at the same time he fulfils the conditions of section 11.

So too, *mutatis mutandis*, no person who fulfils the conditions of section 15, Act I of 1913, can pre-empt agricultural land unless he satisfies the conditions of section 14.

(2). As noted above, the sections aim at re-establishing or preserving the family or tribal basis of the village.

(3). Though a distinction is drawn in the Acts between agricultural land and village immoveable property, the same rules of exercise of right and order of preference apply to both, subject to the conditions of sections 11 and 14.

In other words, all village immoveable property of whatever nature is subject to the rules laid down in section 12, Act of 1905, and section 15, Act I of 1913, and all agricultural land wherever situate other than in places exempted under section 7, Act II of 1905, or section 8, Act of 1913.

(4). Property is divided into four classes in both Acts noted above *a, b, c* and *d*, the division being slightly different in the two Acts. The primary division is into proprietary rights and occupancy rights, with a cross division into whole properties and separate shares of properties.

Where less than the whole number of shares are sold, the property sold is treated as a share under Act II of 1905 where all the shares are sold as a single property, but under the Act of 1913, if any share is sold by all the co-sharers therein, it is treated as a sale of the whole property.

(5). The sections contain the whole law relating to statutory qualifications, and determine finally the order of preference, and just as under the Punjab Laws Act a Government notification declaring what a custom was, was ineffective unless that custom had been accepted, so *a priori* a Government notification cannot affect the law laid down in this section unless it be made under the provisions of section 7 of Act II of 1905 or section 8 of Act I of 1913. Nor can, subject to the same proviso a condition in a Government lease excluding pre-emption,

(2). C. A. 954 of 1905, P. R. 37 of 1906.

In a suit to pre-empt certain land in a *jagir* village of the Goler Jagir, Kangra District, it appeared that the plaintiff, as a landowner in the village had by custom a superior right to that possessed by the vendee, but the latter contended that by the custom of the village, as laid down in Punjab Government letter of 1862, such rights were restricted to shareholders descended from a common ancestor.

This rule had not been embodied in any of the village administration papers of the Goler Jagir.

The presumption under section 12, Punjab Laws Act, being in favour of the plaintiff, held the *onus probandi* was on the defence to rebut, and that the letter of 1862 has no effect in declaring the custom in those villages, where it has neither been accepted or embodied in the administration papers.

(ii). C. A. 1866 of 1907.

Government had leased certain land on the Sidhnai Canal in which proprietary rights had been acquired under the lease, one of the terms of which was that no rights of pre-emption could be claimed.

Held, plaintiff was not bound by such condition, for such provision could not override the provisions of an Act of the Legislature.

Note, however, that these lands have now been notified under section 7 (2), Act II of 1905, *vide* App. IV.

Contra—

C. A. 2 of 1899.

(6). As no other statutory qualifications are advancible, the Acts of 1905 and 1913 differ from the Punjab Laws Act.

Under the Panjab Laws Act any customary qualification was urgable and the following grounds were actually advanced, but unsuccessfully :—

(a). Vicinage.

P. R. 20 of 1881, 49 of 1889, 77 of 1906.

See, also, 6 N. W. P. H. C. R., p. 377, and XXXIII All. 28.

(b). Larger size of one co-sharer's share.

P. R. 59 of 1870.

(7). The Acts of 1905 and 1913 recognize no difference between villages held on ancestral shares and other villages.

(8). A person who has two or more qualifications, in virtue of which he may sue, can elect which of his titles to sue on, if either of these will be successful in regard to the whole property.

P. R. 22 of 1901.

In a suit for pre-emption of an occupancy holding, held, that a landlord, who was also an occupancy tenant in the same village, served with a notice under section 53, Tenancy Act, who sued to pre-empt as an occupancy tenant, was at liberty to claim pre-emption under either of his qualifications, and his failure to proceed under the Tenancy Act did not bar him from resorting to the Civil Court.

NOTE.—If he has two separate qualifications each entitling him to succeed only in respect of a part, he must assert the two if thereby he can take the whole property.

(9). But a landlord entitled to pre-empt under section 53, Tenancy Act, must go to the Revenue Court if he wishes to pre-empt under that section.

(10). The words “entitled to inherit” must be construed with reference to the customary or personal law of the parties.

An adopted son and his descendants would be included, except in the case of occupancy tenants, whose only heirs under section 59, Tenancy Act are his male lineal descendants, his widow for life, and his male collaterals descended from a common ancestor who held the land.

(11). Section 12 (c), Act of 1905, and section 15 (c), Act I of 1913, only come into operation when clauses *a* and (*b*) are exhausted.

Section 12 (c) and section 15 (a) firstly, introduce an entirely new law in giving inferior proprietors a preferential right in respect to superior proprietary rights and *vice versa*.

In the following cases an *adna malik* was held to have a preferential right over an *ala malik* when an *adna* tenure was sold to an *ala malik* :—

(i). P. R. 72 of 1897.

Mauza Sorab Hisar, Dera Ismail Khan.

(ii). P. R. 11 of 1877.

Contra by custom :—

P. R. 16 of 1905.

So also, where an *adna* tenure was sold to an *adna malik*, the *ala malik* was held to have no right of preference.

(i) P. R. 64 of 1904.

Mauza Khatar, District Peshawar.

(ii). P. R. 44 of 1870.

Multan.

(iii). XXIII All, 427.

(iv), XXVIII All, 457.

(12). Where a word is used in the singular or plural alone, it includes the plural or singular as the case may be under the General Clauses (Punjab) Act.

(13). Under section 12 (*b*) and (*c*) in Act II of 1905 a right was given jointly and severally. A considerable amount of doubt arose as to the exact scope of these words,

Where there was a sale by a co-sharer to a stranger there does not seem to have been any room for doubt, and I consider that all the differentiation amounted to was that the right of an individual co-sharer to pre-empt was postponed until it was clear the remaining body of co-sharers was not willing to pre-empt. If they did not sue then the individual co-sharer could sue. It was not a case of preference, for the result would be the same in any case, if the whole body sued as a body they took the whole bargain *inter se* according to their respective rights, if some or one sued they or he took the whole bargain dividing *inter se* according to right, and if all sued in separate suits the result was exactly the same. The only difference would be in the form of the decree, for each decree would have to cover the whole property.

It was also considered a doubtful question whether, if the body of co-sharers did not sue, could more than one and less than all sue, or was the right confined to the whole body as a corporation or the single individual. I think the word "several" covered the case of two persons joining their right in one suit and that there was nothing under Act II of 1905 to prevent the claim.

This seems to be the view taken in the following rulings: —

(i). X Cal. 1008.

Under Sunni Law the right of pre-emption may be exercised by one or more of a plurality of co-sharers.

(ii). P. R. 83 of 1907.

If there is no joint claim by the co-sharers then each co-sharer is entitled to claim for himself.

(iii). P. W. R. 179 of 1912.

Section 12 (c) thirdly, does not require that either all the owners should sue jointly or only one of them should sue in respect of his individual and several right. Under it, even some out of many owners can sue while the others elect to stand aside without taking any action in the matter.

As to the property they must claim, see the Chapter on Nature of the Pre-emptive Right.—Whole Bargain. Whoever sues must sue for the whole bargain.

This point is, however, now cleared up by section 13 of the Act of 1913. In cases to be decided under that Act, where any class or group of persons is entitled to pre-empt, the whole class can pre-empt as one person, or failing the whole class any two or more thereof, and failing them any individual of the class or group, but here it must be carefully noted that the section does not create any preferential right *inter se* of the jointly interested parties.

No question of that sort arises when all the co-sharers join in suing in one suit, but where some sue in one suit and only one in another, the former have no preferential right over the single claimant and *inter se* division will be determined by the rules of division given in section 17.

Section 13 simply defines the words "jointly and severally" and gives permission to individuals of a class or group to sue separately or in sub-groups when the whole group does not join.

In section 12 (a) (b) firstly, secondly, thirdly, and (c) firstly, Act II of 1905, the words jointly and severally are not given. Does it mean that there was no joint and several right? The Act is silent on the point and the drafting might lead to the interpretation that there was only a joint and several right where expressly given, but in view of the fact that under the General Clauses Act the singular includes the plural and *vice versa*. I think the right was always a joint and several one, and this is the view taken under the Punjab Laws Act in P. R. 42 of 1891.

(14). A far more difficult question arises where one co-sharer sells his share to another co-sharer.

That the purchasing co-sharer can resist the claim of one pre-empting co-sharer on the ground that their rights are equal admits of no doubt.

P. R. 17 of 1884.

Where there is no joint claim by the shareholders in a *patti*, the shareholder asserting his individual right and suing has no preferential right over another buying.

But suppose the joint holding is held by 5 co-sharers A., B., C., D., and E., and A. sells to B. Can C., D., and E. pre-empt the bargain or so much as would have fallen to their share in case of inheritance.

Section 13 of the Act of 1913 does not appear to have touched this question. No preferential right is created thereby in favour of the majority of the plurality as against an individual member of the plurality. It only lays down that either the whole class or some of the class or one of the class can exercise a right of pre-emption.

In such a case as that indicated the majority as such has no preferential right over the individual purchasing.

The law does not recognize the right of co-emption.

P. R. 83 of 1907.

Under Punjab Pre-emption Act of 1905 a co-sharer in joint undivided agricultural land has no right of pre-emption in respect to a sale of a share made to any of the several co-sharers in the estate. There is no provision from which it can be inferred that, where the claimant has been able to make a several claim, the acquisition would be for the benefit of the other co-sharers. The present Act has made no provision for co-emption.

No doubt this was a case where only one co-sharer appears to have sued in respect to a sale to another co-sharer but the principle is equally applicable.

Under the Punjab Laws Act and the Muhammadan Law the right of co-emption was recognized in P. R. 54 of 1882, 111 of 1901, XIX All. 466 and XXI All. 292, but found not to prevail in P. R. 94 of 1904 F. B.

I do not think, therefore, that under the present Act there is any right of co-emption.

(15). There is still however a third case.

Suppose a sale is made by A., and B., C., D., E. are all equally entitled to pre-empt the sale, whether as heirs or in any other statutory capacity, A. selling to a stranger. Is the individual right of B. not exercisable if C., D. and E. sue to pre-empt.

In this case also the mere fact that B sues separately shows that the whole entitled body are not going to sue jointly and under section 13 he is fully entitled to bring a suit in his own right.

I do not think his individual right is in any way affected by the fact that all the remaining entitled pre-emptors sue jointly.

The Act clearly does not provide for that. In P. R. 83 of 1907 the point was referred to, but the Judge deciding the case would not commit himself even to the view that a sale to one co-sharer was pre-emptible by the remaining body of co-sharers, and the same principles appear to apply here.

Sections 15 and 16 when read in connection with section 13 do not appear to me to create any preferential right in favour of any body of jointly interested persons as against any individual member thereof, and where a sale is made to a member of such body he can resist the claim of all the rest to pre-empt on the ground that there is no law of co-emption, and the claim of the remaining members is in no way superior to his individual right, and further that if any individual member of a jointly interested body chooses to file an individual claim he is perfectly entitled to do so, even if all the rest of the body is prepared to file a joint claim, but of course in such a case, if he sued separately and the rest of the jointly interested persons sued in another suit, the distribution of the property would be in accordance with the rules laid down in section 17.

(16). We have seen above that a landlord has under sections 53-4, Tenancy Act, a preferential right to buy the sale of occupancy rights made by an occupancy tenant under section 5. But that right does not exist where the occupancy tenure falls under another section, nor can the right even as regards section 5 tenancies be asserted in a Civil Court.

Consequently when an occupancy right not under section 5 is sold, or where an occupancy right under section 5 is sold, and the landlord does not proceed under the Tenancy Act to enforce his right, but comes into a Civil Court under section 12, Act of 1905, or section 15, Act of 1913, he must fail if the purchaser of the occupancy rights is a lineal descendant, heir, agnatic co-sharer or an ordinary co-sharer. Moreover, he, even if he is a *pattidar*, has no preference over other *pattidars*, or if he is merely an owner of the estate he has no preference over other owners.

The landlord's right, therefore, as a landlord is only superior in the Civil Court to occupancy tenants who are not lineal descendants, heirs, agnatic co-sharers or co-sharers.

It seems anomalous that, without having recourse to the Revenue Courts, he has less rights over land held by his occupancy tenants than occupancy tenants have over his own proprietary interests.

It should, however, be noted that, if the purchaser of the occupancy rights is a landlord, no one can upset the sale to him, for he will be regarded as having asserted and exercised the statutory right he had under the Tenancy Act.

(i). P. R. 16 of 1905.

A. sold with other lands his share of occupancy rights in village P. to G., the recorded proprietor of the said holding B., a brother and co-sharer of A., sued to pre-empt.

Held, he had no *locus standi*, the sale having been made to the proprietors of the holding who have a statutory right of purchase under Chapter V, Tenancy Act, could not in respect of the occupancy tenancy be contested by P., a co-sharer therein.

(ii). P. R. 36 of 1912.

The sale to a landlord of occupancy rights under section 6 of the Tenancy Act is liable to pre-emption.

The pre-emptor was a joint occupancy tenant with the vendor.

(17). Under section 12, Act of 1905 (section 15, Act of 1913), a son has an absolutely independent right from his father to pre-empt.

P. R. 7 of 1912, P. W. R. 182 of 1911, P. W. R. 54 of 1912, P. L. R. 89 of 1912.

But not under section 13, Act of 1905 (section 16, Act of 1913), P. L. R. 8 of 1912.

Nor under section II, Act of 1905, P. W. R. 2 of 1913. See Waiver.

8. Section 13 (1), Act of 1905, gives the statutory qualifications which a pre-emptor must possess under that Act in regard to urban immoveable property, and the order of preference of these statutory qualifications is also given there.

The description of these qualifications given in the Act is very loose, for instance it speaks in fourthly and fifthly as if the common staircase and common entrance might exist somewhere else than by the property sold. Of course it does not mean that a person having a common staircase with the vendor or having a common entrance from the street with the vendor in some other property has a right of pre-emption. Such ownership must be in a staircase or entrance attached to the property sold, though the wording of the Act would leave it open to argument that they might be possessed in connection with some other property.

The Act undoubtedly means that the qualifications should be one or the other of the following :—

(1). Co-sharership in the property sold, the right being exercisable first by all the co-sharers jointly, then by each co-sharer separately.

(2). Ownership of a building or structure on a site, when the property sold is the site of such building or structure.

(3). Ownership of a floor or floors in a building adjoining a floor sold in such building.

(4). Ownership of a common staircase with the owner of the property sold, such common staircase being attached to the property sold and the pre-emptive tenement.

(5). Ownership of a common entrance from the street with the owner of the property sold, such common entrance being the entrance to the property sold and the pre-emptive tenement.

(6). Ownership of a property by virtue of which the owner has a right of easement over the property sold, or ownership of a property subject to a right of easement by the owner of the property sold in virtue of owning such property.

(7). Ownership of an adjacent property.

Section 16, Act of 1913, has redrafted section 13 (1), Act of 1905, with considerable advantage, and it has also removed one statutory qualification, viz., that contained in section 13 (1) thirdly. The ambiguity referred to above has entirely disappeared, and the qualifications now are—

(a) Co-ownership in the property sold.

(b) Ownership in the building or structure on a site when the site is sold.

- (c) Ownership in property which has a common staircase with the property sold.
- (d) Ownership in property which has a common entrance from the street with the property sold.
- (e) Ownership in a dominant or servient tenement when the servient or dominant tenement is sold.
- (f) Ownership in immoveable property contiguous to the property sold.

This section must be read also with due regard to section 13, so in all these cases where there is more than one owner or co-sharer, the body of owners or co-sharers can claim the right, or any two or more of such body, or finally any individual member of that body.

The terms requiring definition have already been defined in the Chapter on Definitions.

The following points require notice :—

(1). The same remarks apply to the exercise of the joint right as under section 12, Act of 1905 and section 13, Act of 1913, *i.e.*,

- (a) even when several co-sharers do not join in pre-empting a sale to a stranger any one co-sharer can sue.

P. R. 42 of 1891.

One co-sharer in a house is not debarred from instituting a suit to enforce a right of pre-emption, if the others will not join in.

(This particular ruling applied to an adjacent house sold to a stranger, but the principle is equally applicable).

- (b) where one of several co-sharers sells to another, the remaining body of co-sharers, even when suing together, have no preferential right over the purchaser, as there is no law of co-emption now in existence, even section 13 not giving a preferential right.

(2). No other qualification is provable as giving a right to pre-emption other than those given above, consequently rights formerly decreed on other qualifications cannot now be decreed on those qualifications.

Qualifications recognized in some cases under the old law but not recognized now were :—

- (a) relationship in P. R. 12 of 1883, but disallowed in P. R. 83 of 1880, 97 of 1880, 113 of 1881, 82 of 1889, 53 of 1888, 99 of 1900, and 70 of 1902,
- (b) proximity, see "contiguous" in Chapter III Definitions (p. 59),

(3). The sections are not exclusive in their order, that is if a pre-emptor is entitled to pre-empt under two clauses he is not debarred from asserting his right under both. On the contrary, if he is entitled to pre-empt one part of a property under one qualification, and another part under another, not merely can he, but he must, assert both his qualifications, and sue in respect of both for the whole.

P. R. 10 of 1909.

The several clauses of section 13 define the priorities of different claimants, and where a pre-emptor sues for pre-emption falling under one clause, and omits to sue for other property falling under a different clause he offends against the vital canon of pre-emption, which requires that he must take the entire bargain so far as his right extends.

(4). But as the order given is clearly one of priority a person who possesses two qualifications suing a vendee who has one, and that is equal to the claimant's higher qualification, the plaintiff is not, by virtue of his second inferior qualification, entitled to succeed.

C. A 1259 of 1908.

The plaintiff and vendee each had a common entrance with the vendor, but in addition plaintiff's house was adjacent to the property sold.

Held, the vendee's sale cannot be defeated.

(5) (a). Clause 13 (1) firstly and section 16 (firstly) reproduce a qualification recognized by custom already in P. R. 71 of 1905 and 138 of 1907, and recognized by statute in section 11, Punjab Laws Act.

It should be noted, however, that the right only vests in the owner of the adjacent property at the time of the sale, and not in his heir, P. L. R. 8 of 1912.

(b). Clause 13 (1) secondly and 16 (secondly) give rise to a qualification not hitherto recognized by custom or statute.

The converse rule, *viz.*, giving ownership of the site as a qualification to pre-empt the building thereon has been omitted, though of course such an owner would have a right under clause seventhly as the owner of adjacent property.

The omission is unfortunate, for where an *amladar* has built on another's land by contract, a special term is inserted in the contract giving the site-owner the right to evict on buying the material. As under the Pre-emption Law the right of pre-emption cannot arise from contract, the result is that if anyone chooses to come forward to assert pre-emption the contract becomes nugatory.

The custom also was a well-recognized one in published decisions, *viz.*, P. R. 101 of 1883 and 7 of 1907, though the contrary was held in P. R. 8 of 1893.

(c). Clause 13 (1) thirdly Act of 1905 also created an entirely new qualification in the Punjab. It was once recognized in the Allahabad Courts in 5 N. W. P. H. C. R. 31, but it has disappeared as a qualification under Act of 1913.

(d). Clause 13 (1) fourthly and 16 (thirdly) also introduce a practically new qualification. It has only once before been urged in decided cases, and then unsuccessfully, *viz.*, P. R. 36 of 1897.

(e). Clause 13 (1) fifthly and 16 (fourthly) also introduce a qualification not hitherto successfully asserted. The qualification was disallowed in P. R. 192 of 1888 (Ludhiana), 109 of 1900 (Nikodar), and 43 of 1903 (Delhi).

(f). Clause 13 (1) sixthly and 16 (fifthly) reproduce a well-established rule of Muhammadan law, and there are also several cases under custom establishing the right in virtue of the possession of or subjection to an easement.

The definition of the terms "dominant and servient" has been dealt with in the chapter on Definitions.

It suffices here to say that the terms in the Pre-emption Act must be defined with reference to the Law of Easements and not with reference to the Muhammadan view of easements in its Pre-emption Law.

Under that law, *i. e.*, Muhammadan law, time is not an element in determining whether there is an easement or not:—

XXXI ALJ. 519.

The Muhammadan law does not prescribe any period which would give a person the right to enjoy an immunity such as that of discharging water or a right of way.

But this is not the law under the Pre-emption Act.

It should be noted that, as under Muhammadan law, any easement gives rise to the right of pre-emption.

(i). P. R. 32 of 1899.

Where plaintiff's house is servient to the property sold that fact gives him a preference as against a vendee whose house opens into the same *kucha* as part of the property sold.

(ii). N. W. P. H. C. R. 1874, p. 377.

Where there are appurtenances to two properties one has the right to pre-empt over the other.

(iii). 3 B. L. R. A. C. 1896.

Where two properties are subject to the same servitude the owner of one has the right to pre-empt the other.

(iv). XXVIII All. 127.

Under Muhammadan law the owner of a dominant tenement has, in respect of, a sale of the servient tenement, a right of pre-emption preferential to the right of a mere neighbour.

The easement, enjoyed or suffered, must however be a private and not a public easement.

XVI All. 247.

In order that two persons may become *shafi-i-khalits* or persons having a right of pre-emption in virtue of the common enjoyment, *e. g.*, of a road, it is necessary that such road should be a private road and not a thoroughfare.

It is also obvious that everyone entitled to the easement has an equal right.

XVI All. 247.

Among persons who are *shafi-i-khalits* by reason of being sharers in a right of way, all those who are sharers in such right of way have equal rights of pre-emption, although one of them may be a contiguous neighbour.

And this is made quite clear in the Act of 1913 by section 13.

In the following cases the particular easements mentioned have been held to confer the right of pre-emption :—

(i). Ownership of a common wall.

P. R. 97 of 1880.

Contra :—

P. R. 36 of 1897.

(ii). Right of way.

P. R. 24 of 1887.

(iii). Light and air.

XXVIII All. 127.

(iv). Right of discharging water.

XXVIII All. 127.

XXXI All. 519.

XXIV Bom. 415.

(v). Subjection to a right of discharging water.

XXXI All. 519.

But not the right to support under Muhammadan law as, though an easement, Muhammadan law gives preference to appendages. XXIV Bom. 415.

(g). Clause 13 (1) seventhly and 16 (sixthly) reproduce the principle ground on which, under the Punjab Laws Act, the right of pre-emption was based by custom.

The meaning of the word "adjacent" and contiguous have been given in the Chapter on Definitions (p. 59).

The word "property" includes a shop, and though a shop cannot be pre-empted the possession of a shop gives a right to pre-empt adjacent property, 80 P. R. of 1911.

(h). It should be noted that, except under sub-clause first, there is no joint and several right of pre-emption expressly created in respect to urban immoveable property in the Act of 1905.

If however the right of pre-emption resides in a body of persons, they could sue together, the law regarding them as a corporate body, that is as a single person.

So too anyone of the corporate body could exercise the right entirely independent of the others, *see* P. R. 42 of 1891, *supra*, but if every individual member of the corporate body sued to pre-empt, or if two or more persons having equal rights based on separate qualifications sued the property would be divided between them in accordance with the principles in the Chapter on Division among Pre-emptors.

Now under section 13, Act of 1913, as already noted, the right is one which can be exercised by the whole body of owners, or any two or more or any one, and if say two co-sharers or owners sue in one suit to pre-empt the whole, and in another suit one sues, then the division will be according to the principles given in Chapter VIII.

It is also a point to notice that if two co-sharers or owners or other jointly entitled persons out of a plurality sue under sections 15 or 16 to pre-empt, they must sue to pre-empt the whole property and not their particular shares, even in the case where there is any co-sharer or owner or group thereof less than the whole body suing, and, in case that is not done, the suit must be dismissed, it being in derogation of the doctrine that the whole bargain must be taken over.

CHAPTER VIII.

DIVISION AMONG EQUALLY ENTITLED PRE-EMPTORS.

1. Rules laid down in section 14, Act II of 1905, and Act I of 1913.
2. Rules of division in respect to agricultural land and village immoveable property.
3. Defects in rules laid down in Act II of 1905.
4. Rules of division in respect to urban property.
5. Defects in rules laid down in Act II of 1905.
6. The old right of election.
7. Rules under the old law where no election.
 - (1). Division *per capita* in respect to village property.
 - (2). Superior diligence in respect to urban property.
8. Exhaustive nature of the rules.

CHAPTER VIII.

DIVISION AMONG EQUALLY ENTITLED PRE-EMPTORS.

1. Section 14 of the Act of 1905 and section 17, Act of 1913, which give the rules to be followed in the division of pre-empted property among equally entitled pre-emptors, have entirely recast the pre-existing law, and section 17 has introduced one clause which has abolished much of the old learning.

The rules laid down in the sections apply only to rival pre-emptors, that is to say claimants to a property already sold, who are actually before the Court, and have no relation to disputes between a pre-emptive claimant and a vendee with equal rights, for the simple reason that co-emption has been entirely abolished by the Acts, see Pre-emptor Chapter Definition (p. 84).

The sections purport to give rules of general applicability to all property subject to pre-emption, but a perusal of the terminology thereof shows that clauses *b, c, d*, cannot possibly apply to urban immoveable property, for the persons mentioned therein are not persons qualified under section 13, Act II of 1905 or section 16 Act I of 1913 to pre-empt.

It will simplify matters therefore if we differentiate the different kinds of property.

2. The rules of division among equally entitled, *i.e.*, qualified pre-emptors, with respect to agricultural land and village immoveable property are :—

(1). In the cases mentioned in *a, b, c, d*, division is to be in proportion to the measure of the rival pre-emptor's rights, *i.e.*,

(a). If they are co-sharers in the property sold, claiming under the qualifications in section 12 (*b*), Act of 1905 or 15 (*c*) Act of 1913, in proportion among themselves to their existing shares in the property sold.

(b). If they claim as heirs, whether co-sharers or not, claiming under the qualifications in section 12 (*a*) and (*b*) Act of 1905 or section 15 (*a*) and (*b*) Act I of 1913, in proportion to their respective shares in the inheritance should it open out in their favour.

(c). If they claim as owners of the *patti* or estate, i.e., if they claim under the qualifications 12 (c) first, secondly, thirdly, of Act II of 1905 or section 15 (c) first, secondly or thirdly, Act I of 1913, in proportion to the shares they would take in the property sold if the said property became *shamitat deh* or *patti*.

(d). If they claim as occupancy tenants, claiming under qualification 12 (c) fourthly or fifthly Act II of 1905 or section 15 (c) fourthly or fifthly Act of 1913, in proportion to the area held by them in occupancy right.

(2). In all other cases the vendee had the option of election under Act II of 1905 and consequently there would be no division, but under Act I of 1913 there is no election, so in all other cases the pre-emptors divide in equal shares.

(3). The sections are not well-framed.

In the first place clause 14 (d), Act II of 1905, 17 (d) Act I of 1913 would seem to mean that all occupancy tenants share according to the rule therein laid down, but it obviously is not so, for if they are co-sharers or heirs they follow the rules laid down in (a) and (b), and clause (d) after the word "tenants" should include the words "and not being co-sharers or heirs".

In the second place no direct provision is made for persons qualified under 12 (c) Act II of 1905, 15 (c) firstly Act I of 1913, firstly, but if the rivals are co-sharers in the superior or inferior proprietary rights, as the case may be, or heirs, then too they will fall under clauses (a) and (b), if not they will come in under clause (c).

In the third place the qualifications in regard to agricultural land and village immoveable property would appear to be exhausted in rules (a), (b), (c), (d), and clause (e) seems quite superfluous.

In the fourth place, if conceivably there are cases relating to agricultural land or village immoveable property not falling under (a), (b), (c), (d) and covered by clause (e), no provision was made in the Act of 1905 for cases where the vendor would not elect.

We will accordingly have to discover what rule would be applicable in such a case under that Act. The matter will be discussed *infra*.

By section 17 (e) of the new Act an exhaustive method has been attained to.

4. The rules of division among equally entitled pre-emptors where the property sold is urban immoveable property are:—

(1). If they claim as co-sharers in the property sold, in proportion among themselves to the shares they already hold in the property sold.

(2). In any other case under Act II of 1905 the vendor could choose which of the claimants might pre-empt, that is to say there was no division in such a case, but in the Act of 1913, section 17 (e) the division in such case is equal among the pre-emptors.

5. The rules under Act II of 1905 are defective in that,

(1). Clause (e) does not state whether the vendor is entitled to say that each pre-emptor is to take such share as he fixes, though I think it means he can only assign the property as a whole to one or the other.

(2). No provision is made for the case where the vendor refuses to elect.

In regard to clauses *a, b, c, d*, there will generally speaking be no difficulty. As regards shares they are easily ascertainable on the evidence, and the same applies in most cases under (c), but that clause is somewhat more complicated, inasmuch as there is no uniform rule for determining the rights in the *shamilat* of owners in the *patti* or estate. In some villages the *shamilat* is divisible according to definite fractional shares, in others in accordance with the areas actually held.

In some villages again there is no *shamilat*, though provisions are usually found, even in such cases, in the *Wajib-ul-arz* for division of *shamilat* should such come into existence.

The village papers will have to be therefore seen and the mode of division of the *shamilat* ascertained.

If there be no *shamilat*, and no provision is made as to what is to happen in case a *shamilat* does arise, probably resource would have to be had to clause (e).

6. I have noted above that the present law introduces great changes in the law relating to division.

The first point to note is in regard to the election of the vendor.

Under the Punjab Laws Act, the election of the vendor had to be exercised once and for all before the sale. He could not elect once he had parted with the estate, and his election was therefore not strictly one between pre-emptors, as the word is used in section 14.

The authorities that his election must be made before sale under the old law are—

P. R. 20 of 1881, 29 of 1892.

That the principle was extended by the Act of 1905 to cases after a suit had been brought is clear from,

(i). P. R. 88 of 1908.

Where rival claimants are found to be equally entitled to the right of pre-emption, preference must be given to him who is elected by the vendor under clause (e). The vendor can choose which of the two claimants to pre-empt, both being superior to the vendee, shall buy.

(ii). Note on the Bill.

"The clause now drafted extends that power (*i. e.*, the vendor's right of election) to cases where the sale is complete".

The second change which should be noted is that the principle of election was extended by Act II of 1905 to the sale of urban immoveable property. Under the Punjab Laws Act it only applied to cases of rural immoveable property. The Act of 1913 has entirely abolished the power of election, substituting for it the simple provision of equal division, consequently all that follows in regard to superior diligence is inapplicable thereto, though it is curious to note that the effect of this new provision is to revert to the old principle of division *per capita* which obtained in the original rule of Muhammadan and Punjab Customary Law.

7. We have already seen above that no provision is made under Act II of 1905 for cases where the vendor refuses to elect. As such may arise we must look for a rule of law, and we can only do so by falling back on the old law, which must still hold good under that Act except where it has been modified by its provisions—

Rules are forthcoming in regard to both rural and urban property.

(1). Briefly stated the rule as regards rural property is :—

Where clauses *a*, *b*, *c*, *d*, are inapplicable, and the vendor refuses to elect under clause (*e*), the property shall be divided among the rival pre-emptors *per capita*.

I deduce this rule from the fact that the original rule of Muhammadan Law and Punjab Customary Law relating to pre-emption was that division should be *per capita*, and, except where that rule has been abolished, it must still be followed under Act II of 1905 as furnishing the rule of law.

It is unnecessary to reproduce all the rulings showing that division of rural property was *per capita*. It will suffice to note the rulings :—

P. R. 20 of 1881, 29 of 1892; 87 of 1894 F. B.; 87 of 1896.

I All. 291; VII All. 720; XI All. 164; XIX All. 466; XXI All. 292 and XXVII All. 465.

(2). The rule as regards urban immoveable property under Act II of 1905 is :—

Where clause (a) is inapplicable, and the vendor refuses to make his election under clause (e), the person who has shown superior diligence in suing must succeed.

The doctrine of superior diligence was always applied under the old law in cases relating to urban property, and, following the principle given above, that rule still holds good except in such cases as it has been expressly abrogated in.

In P. R. 83 of 1908 there is the following expression “ The doctrine of superior diligence is inapplicable,” from which it may be argued that it was entirely abolished by Act II of 1905, but the judgment really means that it is inapplicable if the vendor will elect.

That it was not abolished entirely by that Act but held good in all cases relating to urban property not falling under clauses (a) and (e) is clear from,

P. R. 90 of 1909.

Chatterji, J. :—

“ The equitable doctrine of superior diligence has been generally recognized,”

and from rulings after 1905 given below.

I consider therefore it is beyond question that the doctrine of superior diligence had a limited field under Act II of 1905.

It should be noted however :—

(a) That the doctrine does not and never has applied to agricultural property, but is and has always been confined to urban property.

(i). P. R. 29 of 1892.

The doctrine of superior diligence applies to houses in towns only. The cases do not lay down any general proposition that, when one of several persons equally entitled to pre-empt shows greater diligence than the others in prosecuting his claim, he is solely on this ground entitled to retain the whole property against all subsequent and less diligent claimants.

When suits for pre-emption have been filed at different times by persons equally entitled to pre-empt under section 12 (a). Punjab Laws Act... the general rule is that each will be entitled to a decree for a proportionate share of the property.

(ii). P. R. 139 of 1894.

The doctrine of superior diligence applies to the case of a house, and not to a case provided for by section 12, Punjab Laws Act.

(iii). P. R. 90 of 1909.

Chatterji, J.:—

The equitable doctrine of superior diligence in suing has been generally recognized in the case of urban immoveable property. In regard, however, to several claimants for pre-emption of agricultural land, this Court and the Allahabad Court holds that each claimant was entitled to a proportionate share or a division *per capita*.

(iv). See also all the cases referred to below in discussing other points re superior diligence. It will be noted that with one solitary exception, P. R. 7 of 1910, they deal with urban property only, and P. R. 7 of 1910 can only be regarded as bad law.

(b). Superior diligence includes priority in suing, whether a decree is obtained or not before the second pre-emptor sued.

(i). P. R. 102 of 1881.

P. and D. had originally equal rights to pre-empt certain house property, both being next-door neighbours. P. first sued for the whole house against D. and the vendee, and got a decree. D. while P.'s suit was pending, also brought a suit against the vendee alone for the whole house and got a decree. No custom was ever alleged by which next-door neighbours were entitled to claim half each in the house.

Held, on D.'s appeal contending half should go to P. and half to himself that P. having, by superior diligence, in asserting his right, got a decree against the purchaser and D. also for the whole house, and D.'s decree against the purchaser being of no avail against P. there was no ground for giving D. half the house.

(ii). P. R. 83 of 1888.

A. and B. were equally entitled to pre-empt. A sued 7 days before B.

Held, though they were really equally entitled, as both A. and B. claimed the whole house, and none of them alleged each was entitled to half, A. must succeed by reason of superior diligence.

(iii). P. R. 43 of 1903.

Where there are rival claimants to the pre-emption of house property, and the respective claimants are found to be equal, preference must be given to him who has shown superior diligence by suing first.

The ruling is distinguishable from land cases, which are governed by section 12 (d), Punjab Laws Act.

(iv). P. R. 20 of 1908.

Superior diligence in suing constitutes a superior claim to pre-empt.

(v). XXVII All. 465.

If after a pre-emptor has got his decree, another pre-emptor with equal rights sues, his claim would manifestly be too late.

(c). The rule of superior diligence applies under Act II of 1905 when the rival pre-emptor gets the property transferred to him by a *mala fide* sale.

P. R. 32 of 1899.

On 3rd May 1894 M. sold premises to B. for Rs. 6,000, and on 1st December 1894 B. sold them to C. for Rs. 7,000.

P. then sued to pre-empt, and C. sold to D. for Rs. 12,000, D. then selling to E. for Rs. 12,000 a fortnight after suit.

E. and P. had equal rights of pre-emption.

The sales by C. and D. were colourable, intended to defeat P.'s claim and E. had joined in an intrigue by fictitiously raising the price against P. and adding to his difficulties in proving his claim.

Held, though the doctrine of *lis pendens* was not applicable in the case, as the price of the sales by C. and D. had been fixed in bad faith, P. a *bona fide* pre-emptor with rights of pre-emption not inferior to E.'s, had taken such action as showed superior diligence on his part, and was therefore entitled to pre-empt.

(d). There is no period of time which is insufficient to show superior diligence under that Act.

See P. R. 83 of 1888 (b), (ii) *supra*, where 7 days priority in suing was held to constitute superior diligence, and

P. R. 32 of 1899, (c) *supra*, where 14 days were held sufficient.

C. A. 753 of 1907.

The principle is not affected by the greater or less intervals between the suits. . . 7 days is quite sufficient to show superior diligence.

Contra :—

P. R. 7 of 1910.

Filing a suit a week earlier than a rival pre-emptor does not amount to superior diligence.

(Note.—This is entirely an *obiter dictum*, as the suit in question related to a sale of agricultural land, to which the doctrine of superior diligence does not apply, and the judgment is a judgment inaccurate in its law throughout).

(e). Superior diligence would of course not give an inferior pre-emptor any right against a superior pre-emptor.

(i). P. R. 139 of 1894.

If a person has a superior right of pre-emption, that right is not affected by the fact that persons with an inferior right have got a decree.

The fact that persons with an inferior right showed greater diligence would not affect the other's right when no notice of the original sale had been given according to law.

(ii). P. R. 26 of 1908.

The doctrine of *lis pendens* does not apply to a sale of immoveable property, subject to a right of pre-emption, by the original vendee in favour of a pre-emptor with superior rights, who had instituted a suit to enforce his rights during the pendency of similar suits by other claimants with inferior rights,

(iii). XXXII All. 340.

Where a pre-emptor having a superior right of pre-emption sues, the fact that decrees have been made in favour of other pre-emptors with inferior rights to plaintiff not being a party to such suits, will be no obstacle to the success of the suit.

(iv). S. A. All. 724 of 1906 ditto.

(f). Of course where an equally entitled pre-emptor to the plaintiff had effectively exercised his right by purchase from the vendee before suit, the question of superior diligence in suing would not arise. The assertion of right by purchase before a suit is brought is in itself showing superior diligence.

On the other hand, the exercise of the right of pre-emption by purchase after a rival has brought a suit brings into operation the doctrine of *lis pendens*, (see Chapter on Qualifications).

(g). A person who has shown superior diligence in suing cannot be defeated by a rival bringing a suit later and getting a decree before. The essence of superior diligence is the assertion of the right first.

P. R. 20 of 1908.

A rival claimant cannot, by obtaining a consent decree in a subsequently instituted suit to which the first claimant was not a party, defeat another with equal rights, who by first filing his suit showed superior diligence.

(h). Superior diligence can be shown in other ways than filing a suit first, *e. g.*, by purchase.

P. R. 90 of 1909.

Chatterji, J. :—

It would be sheer pedantry to say that superior diligence can be shown only by a suit in Court.

(i). Superior diligence only operates when there has been no election.

C. A. 753 of 1907.

8. It should finally be noted that no basis for division other than those given above either in Act II of 1905 or Act I of 1913 are recognized.

The only instance where a different basis than the above mentioned ones has been asserted was in P. R. 91 of 1875, when greater length of contiguity of land was asserted as giving a preference, but the contention was unsuccessful.

CHAPTER IX.

PROCEDURE.

- I.—Court-fees.
- II.—Jurisdiction.
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- III.—Form of Plaint.
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 - A.—In the Original Court.
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 - D.—Disposal of the Pre-emption Money.
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CHAPTER IX.

PROCEDURE.

Chapter IV of the Pre-emption Act deals with certain matters of procedure relating to Pre-emption Law. It also touches on other subjects which are not distinctively matters of procedure, and it omits a very large portion of the law of that subject.

It is proposed in this Chapter to deal with the whole law of procedure so far as it distinctly affects pre-emption, but in doing so, the general law of procedure applicable to all suits will of course be omitted.

The rules of procedure that now prevail are those laid down in the Act of 1913, whether or not the case was pending before that Act came into force, and any reference therefore to the procedure prescribed by Act II of 1905 is unnecessary.

I.—COURT-FEES.

The law as to Court-fees is contained in section 7, paras. (v) and (vi) of the Court-fees Act VII of 1870.

The sections referred to run as follows :—

Section 7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :—

* * * * *

V. In suits for the possession of land, houses and gardens, according to the value of the subject matter; and such value shall be deemed to be :—

(a) where the land forms an entire estate or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,

and such revenue is permanently settled—
ten times the revenue so payable;

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently—
five times the revenue so payable;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and net profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times such net profits;

but where no such net profits have arisen therefrom — the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood :

(d) where the land forms part of an estate, paying revenue to Government, but is not a definite share of such estate, and is not separately assessed as above mentioned—

the market value of the land :

*Explanation:—*The word "estate" as used in this paragraph means any land, subject to the payment of revenue, for which the proprietor or a farmer or *raiyat* shall have executed a separate engagement to Government or which, in the absence of such engagement, shall have been separately assessed with revenue :

(e) where the subject matter is a house or garden, according to the market value of the house or garden ;

(vi) In suits to enforce a right of pre-emption, according to the value (computed in accordance with paragraph (v) of this section) of the land, house or garden in respect of which the right is claimed.

The following points require notice :—

(1). Clause (d) must be applied where the land is not a definite share or separately assessed.

(i). P. R. 6 of 1883.

In a pre-emption suit, unless the land in suit is a definite share in an estate paying revenue to Government or is recorded as separately assessed, the stamp must be calculated on the value of the land under section 7, clause v (d), Court Fees Act, and not on the revenue under clause v (b) of the same section.

(ii). XVI All. 493.

In a suit for pre-emption in respect of separate plots of land, which did not constitute any definite fraction of a distinct revenue paying area, and were not themselves separately assessed to revenue, the Court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on 5 times the Government revenue.

(2). Ordinarily on appeal the same Court-fees are levied as in the original Court, but where the appeal relates only to a difference in price payable, the Allahabad Court has held that the Court-fees are payable only on that difference, whereas the Punjab Court indicates that even in such a case the Court-fee is calculated as for the original suit.

(i). VI All. 488.

Where in a suit to enforce a right of pre-emption, a decree was passed against the vendees-defendants, and they appealed from the same on the grounds that they were entitled to receive from the plaintiff-pre-emptors a sum larger than that found by the Court of first instance to have been the purchase-money, and also that the plaintiffs had estopped themselves from asserting the right by refusing to purchase, held that the nature of the suit was not changed on appeal ; on the contrary the subject-matter in dispute was the "right of pre-emption," the value of which for the purposes of Court-

fee was to be determined in manner directed by section 7 (vi), Court-fees Act of 1870.

Where an appeal is preferred in a pre-emption suit on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court-fees Act must be determined under section 7 (vi). Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other.

(ii). P. R. 92 of 1900.

In a suit to enforce a right of pre-emption a decree was passed against the vendee-defendants, who appealed from the same on the ground that they were entitled to receive from the plaintiff-pre-emptors a sum larger than that found by the Lower Appellate Court to be the purchase-money. Court-fees were paid on 5 times the *jama*, and objection was taken.

Held, the subject of suit being land for which an artificial value had been fixed by special rules, the value for the purposes of Court-fees was to be determined on 5 times the *jama*.

(3). Where there are commercial buildings on land assessed to revenue, the land and the buildings should be separately charged.

XXIV Ail. 218.

The term "land" as used in the Court-fees Act does not include buildings. A claim therefore for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be separately valued and Court-fees paid thereon according to the value of the buildings constituting the factory, and not according to the value of the site.

Such buildings as constitute an indigo factory would fall within the meaning of the term "house" as used in the Court-fees Act.

(4). Where two villages are sold together, the Court-fee is calculated on the aggregate amount of the revenue assessed on both, and not on the revenue of each separately.

The same rule would apply where two separate *khata*s are sold.

XXVII Ail. 186.

Plaintiffs sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid Court-fees on 5 times the aggregate amount of the revenue payable by the two villages together. Held, this was a proper mode of calculation. The two villages were not "distinct subjects" within the meaning of section 17, Court-fees Act and the Court-fees were not therefore leviable in respect of each village separately.

(5). The fact that the land is under mortgage and not capable of immediate possession does not alter the method of calculation.

XXXII Ail. 19 F. B.

In a suit for pre-emption of a sale of land the fact that the land is subject to a usufructuary mortgage and immediate possession cannot be obtained, or is not in fact sought, does not prevent the application of section 7 (vi) of the Court-fees Act to the suit, but the plaintiff must pay Court-fees

upon the value of the land computed in accordance with section 7 (v) of the Act.

NOTE.—The land was under mortgage for Rs. 79,000, and the equity of redemption was sold for Rs. 20,000, plaintiff claiming to buy for Rs. 5,000 on which sum he paid Court-fees.

(6). The value of improvements made by the vendee *ante litem*, the pre-emptor having stood by and taken no steps to prevent building, must be included in value of suit for purposes of Court-fee.

P. W. R. 169 of 1912.

II.—JURISDICTION.

A.—Of Original Court.

Under section 3 (1) Suits Valuation Act VII of 1887, the Local Government may, with the previous sanction of the Governor-General in Council, make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act, 1870, section 7, paras. (v) and (vi).

In pursuance of these powers the following rules have been made by Punjab Government Notification No. 255, dated 25th March 1889.

In suits for the possession of land the value of the land for the purposes of jurisdiction shall be held to be as follows:—

(a) where the land forms an entire estate, or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and the annual revenue payable for such part is recorded in the Collector's register, and such revenue is permanently settled, 60 times the revenue assessed on the land ;

(b) where the land forms an entire estate, or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid, and such revenue is settled, but not permanently, 30 times the revenue so payable ;

Explanation to clause (b). Where the land is a fractional share or a portion of part of an estate, and the land revenue payable for such part is recorded in the Collector's register, and such revenue is not permanently settled, the value for purposes of jurisdiction shall be held to be 30 times such portion of the revenue recorded in respect of that part as may be rateably payable in respect of the share or portion.

Illustrations.

(1). In a suit for possession of a one-third share of an entire holding of 10 *ghumaons* forming part of an estate and recorded as paying Rs. 20 annual revenue, the value of the land for the purposes of jurisdiction is one-third of 30 times Rs. 20 or Rs. 200.

(2). In a suit for possession of 1 *ghumaon* out of the same holding, the value of the land is one-tenth of 30 times Rs. 20 or Rs. 60 ;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the land during the year next before the date of presenting the plaint, 15 times such net profits. But where no such net profits have arisen therefrom, the market value ;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and does not come under (a), (b) or (c), the market value of the land ;

(e) where the subject-matter is a garden, the market value of the garden.

Rule 2.

In suits to enforce a right of pre-emption in land, the value of the land for the purposes of jurisdiction shall be calculated by the preceding rules.

Rule 3.

When the land or interest in suit falls partly under one and partly under another of the classes enumerated in rule 1, the value of the land in each class shall be separately calculated.

Note 9.

In regard to the classes of suits mentioned below there is no express provision in the Suits Valuation Act, 1887, and they do not admit of being disposed of by rules under Part I and are not dealt with by directions under Part II of the Act. The valuation of such suits must therefore be left to judicial decision as occasion arises, namely :—

Suits for pre-emption in respect of houses ;

Judicial decision has since determined that the valuation for jurisdiction in suits for pre-emption of a house is its market value, and in such cases, where there is no fixed rule for determining the valuation, other than assessment, ordinarily the valuation should be taken at what the plaintiff values it, irrespective of any defence raised by the other side.

(i). P. R. 101 of 1900.

The value for the purposes of jurisdiction must ordinarily, and in the absence of any special circumstances suggestive of *mala fides* on the part of the plaintiff, be determined with reference to the claim made, and not to the decision of the claim.

(ii). C. A. 894 of 1901.

Follows P. R. 101 of 1900 and states also the value of the suit is not affected because the defendant on equitable grounds claims compensation for improvements.

Where the subject-matter of suit is a portion of a *khata*, the same rule applies as if it were part of an estate.

P. R. 46 of 1908.

Under the Suits Valuation Act, 1887, the value for the purposes of jurisdiction for possession by pre-emption of land, where the subject-matter is a definite portion of a revenue-paying *khata*, is 30 times such portion of the revenue as may be rateably payable in respect of such portion.

But though a Court may have power to entertain jurisdiction to hear a suit, it does not necessarily follow it can pass a decree in the suit it entertains. So in a case where the valuation calculated on 30 times the *jama* is less than Rs. 1,000 and so cognizable by a Munsif 1st class, he could not pass a decree for pre-emption on payment of any sum exceeding Rs. 1,000,

(i). C. A. 941 of 1905.

Where the *jama* was Rs. 7-8-0, a Court competent to hear could hear the suit, but could not pass a decree in excess of its jurisdiction.

(ii). P. R. 15 of 1908 F. B.

A pre-emption suit was filed in the Court of a Munsiff, 1st class, for recovery of possession of agricultural land. The value for purposes of jurisdiction as laid down by the rules in the Suits Valuation Act was Rs. 644. The Munsiff, whose jurisdiction was limited to Rs. 1,000, gave a decree on payment of Rs. 4,098. On objection being taken to the Munsiff's jurisdiction to pass a decree for that amount, held :—

That the actual value of the land being clearly in excess of the pecuniary limit of the Munsiff's jurisdiction, he was not competent to pass a decree in the case, but should have returned the plaint for presentation to a Court having jurisdiction, on being satisfied the amount due was beyond his jurisdiction.

Contra.—

C. A. 427 of 1907.

Held, that a Munsiff 1st class could pass a decree on payment of Rs. 5,000 where 30 times the *jama* was Rs. 496-12-0.

B.—Of Appellate Court.

(1). Where the appeal is against the dismissal of the suit and not merely against the price held to be payable the valuation is ordinarily that fixed by the plaintiff.

(i). P. R. 3 of 1896.

P sued for pre-emption of certain land, the value of which calculated at 30 times the revenue was considerably below Rs. 1,000, upon payment of Rs. 700, and defendants pleaded that Rs. 1,000, the price entered in the sale-deed was fixed in good faith, and was not in excess of the true market-value. The suit having been dismissed by the lower Courts, plaintiff filed a further appeal in the Chief Court.

Held, under section 40, Punjab Courts Act, no further appeal lay, the true value of the suit being less than Rs. 1,000 and the decree, which merely dismissed the suit, not involving directly any question concerning the price to be paid by the pre-emptor, and that the decree did not involve directly a question concerning land of Rs. 1,000 in value merely because the true value of such land might be of that amount.

(ii). P. R. 101 of 1900, see *A supra*.

In this case the claim was for Rs. 804, the first Court found Rs. 2,000 paid, but the case was dismissed on its merits. On appeal the Divisional Judge made plaintiff pay stamps on Rs. 2,000 in the lower Court and Rs. 1,500 in his own and dismissed the appeal on its merits.

(iii). P. W. R. 214 of 1908.

The District Court dismissed a suit to pre-empt land for more than Rs. 5,000, 30 times the *jama* being less. Held the appeal lay to the Divisional Court and not the Chief Court.

(2). Where the appeal relates to the price payable, the price directed to be paid determines the course of appeal, and not the *jama* levied, when the property in suit is land bearing revenue.

P. R. 29 of 1893.

In a pre-emption suit, of which the value for purposes of jurisdiction was found to be less than Rs. 1,000 the decree of the first Court affirmed on appeal was for possession of the land in suit on payment of Rs. 2,822, the plaintiff having claimed it on payment of Rs. 2,500, and the deed of sale showing the price to be Rs. 4,500 plus 1 *ghamaon* of land.

Held, the decree involved some claim to or question respecting property of the value of Rs. 1,000 and upwards, *viz.*, the price to be paid for the land in suit by plaintiff in his character of pre-emptor, and an appeal therefore lay under the 2nd part of clause "a," section 40 (1), Punjab Courts Act of 1888 without a certificate.

(3). Where the appeal is against a decree for pre-emption, the valuation for the purposes of further appeal under section 40 (1), Act XVIII of 1884 is not the amount for which the decree has been granted, nor the price at which the property has been sold, but the market value of the property.

P. R. 94 of 1890.

A suit for pre-emption on payment of Rs. 400, the price stated in the deed was filed. A decree was given for Rs. 400 and upheld by the Divisional Court.

The defendant appealed further, and on appeal it was ascertained that the real value was over Rs. 2,000. It was objected that no further appeal lay.

Held, an appeal lay under section 40 (1), Act XVIII of 1884 as the decree involved directly a claim to property of the value of over Rs. 1,000.

But in the case of land assessed to revenue for the purposes of a first appeal under section 39 of the said Act the valuation is 30 times the *jama*.

(i). P. R. 83 of 1912.

Plaintiff sued to pre-empt agricultural land, thirty times the revenue of which amounted to Rs. 1,132, the first Court decreed the claim on payment of Rs. 7,000.

Held, the value of the suit for purposes of jurisdiction, so far as section 39, Courts Act is concerned, remained throughout Rs. 1,132, and the appeal therefore lay to the Divisional Court and not the Chief Court.

(ii). P. W. R. 163 of 1911, P. W. R. 201 of 1912.

For the purpose of determining the course of appeal in pre-emption suits we have to look only to the jurisdictional value of the suit and not to the amount which the pre-emptors may have to pay.

(iii). P. W. R. 276 of 1912.

For the purposes of appeal against a decree for the pre-emption of agricultural land the jurisdictional value is 30 times the *jama*.

But see P. W. R. 26 of 1909, where the contrary was assumed.

(4). Where the property in suit is a house, the course of appeal by a vendee is determined not by the price fixed or the price claimed, but by the terms of the plaint.

P. R. 32 of 1901.

Plaintiff sued to pre-empt a house sold for Rs. 150, alleging the price paid and the market value was Rs. 82. Relief sought was a decree on payment of Rs. 82 or market value or price fixed by the Court. The first Court decreed on payment of Rs. 82.

The vendee appealed to the District Judge, who returned the plaint for presentation to the Divisional Court, the latter, considering the question of jurisdiction a doubtful one, submitted the case to the Chief Court under section 617, Civil Procedure Code.

Held, as it could not be affirmed on the plaint that the value of the suit did not exceed Rs. 100, the appeal lay to the Divisional Court, and not to the District Court, the suit being an unclassed one.

(5). A defendant's action *pendante lite* cannot affect the value of the suit. For the purpose of jurisdiction on appeal in a pre-emption suit the value of improvements affected during suit should not be included. P. W. R. 68 of 1912.

III.—FORM OF PLAINT.

In addition to the rules of the Civil Procedure Code applicable to all suits, the following points applicable to pre-emption suits should be noted.

1. Where the plaintiff entitled to pre-empt has joined with him in his suit a person not entitled, the error is remediable by amendment.

See Chapter IV, Nature of Pre-emptive Right (p. 164).

2. The claim must be for the whole bargain sold, but inadvertent errors are remediable by amendment.

See Chapter IV, Nature of Pre-emptive Right (p. 154).

3. An inconsistent claim should not be joined with one for pre-emption.

P. R. 117 of 1890.

A claim to enforce an oral contract of sale and one for pre-emption are inconsistent, but as the objection was not raised until appeal it was not entertained.

4. The claim to pre-empt should state that the purchaser is willing to buy at a fixed price. If it does not, the Allahabad Court has held that the Court is not bound to allow the pre-emptor to pre-empt at any price fixed by the Court, but the Punjab Court has held that he should be allowed to do so, but the matter should be

considered in awarding costs. The Calcutta Court has given conflicting rulings.

Rulings favouring Punjab view.

(i) P. R. 178 of 1882.

A house was sold for Rs. 900, and plaintiff sued to pre-empt at Rs. 400 without expressing his willingness to pay a higher price.

The Lower Appellate Court dismissed the suit *in toto* on the ground that the plaintiff had claimed for Rs. 400 and not for the proper value.

Held, the dismissal was wrong, that there is nothing in the Punjab Laws Act precluding a Court from giving a pre-emption decree on payment of the actual price, and principles of equity require that a Court should determine, once for all, all matters in dispute, instead of leaving the whole thing to be fought out again in another suit. Seeing the plaintiff had paid up the sum demanded by the first Court in the time fixed, though still contesting its being right, the Appellate Court exercised a wrong discretion.

On appeal the price was fixed at Rs. 900, plaintiff got half costs in appeal and parties were made to bear their own costs below.

(ii). X Cal. 1008.

It is unnecessary for the pre-emptor to tender the actual price paid for the property claimed, it being sufficient if he states that he is ready to pay such sum as the Court may assess as the proper price of the property.

(iii). N. W. P. S. D. A. Rep. 1863, Vol. I, 446.

Inasmuch as plaintiff's right of pre-emption had been established the Court of first instance should have allowed him to exercise that right on payment of the sum found to be the price of the property, notwithstanding that he had claimed the same for a smaller price.

Rulings opposed.

(i). H. C. R., N. W. P. 1866, p. 265, 2 W. R. 38, 7 W. R. 210.

Where plaintiff sued to pre-empt, after refusing to buy at a larger sum, for a smaller sum, and the larger sum was found to be the proper amount the suit was dismissed.

(ii). I All. 591.

Where plaintiff in a suit to enforce a right of pre-emption sued alleging that the actual price was lower than that stated in the deed, and claimed to purchase on the smaller price, and did not say in his plaint that he was ready to pay such other price as the Court found was actually the price, and on the day his suit was disposed of by an order finding that the price in the deed was the price paid and dismissing the suit, he applied saying he was ready and willing to do so, held the Court was not bound to allow him to amend his plaint and bring into Court the larger price.

(iii). III All. 753.

The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found that plaintiff had such a right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff, the Lower

Appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. Held it was not necessary to interfere with the exercise of the Lower Appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of appeal.

On appeal by the vendee against this order parties were directed to bear their own costs.

Though the result arrived at in this case and I All. 591 is different, the principle is the same, *viz.*, that it is entirely a matter for the Court's discretion.

5. Where the existence of a custom of pre-emption has not been judicially noticed it must be pleaded, but where it has been so noticed it is not necessary to set it forth.

XXXV Cal. 575.

It is no doubt correct that when the existence of a custom of pre-emption has not been judicially noticed it must be asserted by a plaintiff and proved, but where the custom has been judicially recognized it is not necessary to do so.

6. See Misjoinder.

IV.—NECESSARY PARTIES.

1. Though convenient to join him, the vendor is not a necessary party, either in the original suit or on appeal.

(i). P. R. 80 of 1888.

The joinder of a vendor in a suit for pre-emption, though useful and convenient, cannot be said to be in every case absolutely strictly necessary in law, so that on account of his non-joinder the pre-emptor must lose all his rights in the suit.

(ii). P. R. 134 of 1889.

A vendor is not as a rule and in all cases a necessary party in a pre-emption suit. No general rule can be laid down, he should be impleaded where there are points which cannot be determined without his being impleaded.

(This was a case where the vendor died and his representatives were not brought on the record in time and limitation was unsuccessfully pleaded).

(iii). P. R. 94 of 1902.

A vendor is not a necessary party to a suit, and therefore an appeal by a pre-emptor against a decree dismissing his claim does not abate by reason of non-impleading the heirs of a deceased vendor.

(iv). P. R. 25 of 1903.

A vendor is not a necessary party.

(v). W. N. (All). 1903, p. 239.

In a suit for pre-emption the vendor is not a necessary party.

(vi). VI All. 57.

On objection by the vendee in second appeal to the non-joinder of a vendor as a party, held, whether the omission to make the vendor a party in a pre-

emption suit renders the suit non-maintainable or not, as the vendee has not been prejudiced by such omission in this case, an objection could not be allowed for the first time on second appeal.

"It would have been more regular and convenient if he had been impleaded, but we are not prepared to hold that the failure to make him a party renders the suit unmaintainable."

(vii). VII All. 167.

The vendor is referred to incidentally as a possible necessary party.

(viii). XXVI All. 549.

On appeal in a suit for pre-emption, the vendor being void of interest is not a necessary party, and his non-service does not cause the appeal to abate.

(ix). XXXII All. 14.

The vendor is not a necessary party to a suit for pre-emption.

2. Where a pre-emption decree has been passed, it is not necessary for the vendor to join in the appeal with the vendee.

P. R. 64 of 1888.

It is unnecessary for a vendor and vendee to join in an appeal against an order decreeing pre-emption.

3. All co-vendees in a joint indivisible purchase are necessary parties, but they are not when the purchase is a divisible one.

(For definition of joint indivisible purchase, etc., see Chapter III, Definitions, Specification of Interests (p. 98).)

(i). IV All. 145.

It is necessary to implead all co-vendees in a joint and indivisible purchase, because otherwise it is impossible to establish plaintiff's right by pre-emption to supersede the sale as a whole.

(ii). XIX All. 148.

Where the shares purchased and the proportionate prices to be paid by each vendee are specified in the sale deed it would not be necessary to make the co-sharer vendee a defendant in the suit, but where there is no such separate specification of the proportionate part of the purchase-money to be paid by each vendee, the co-sharer vendee would be a necessary party as the proportionate part of the purchase-money of each vendee would have to be ascertained.

4. All representatives of a deceased vendee are necessary parties.

(i). P. R. 149 of 1889.

All representatives of a deceased vendee and persons in possession of his estate are necessary parties in a pre-emption suit.

(ii). P. R. 66 of 1896.

There is no doubt that every heir of a deceased vendee is a necessary party.

5. Where there has been a resale by the first vendee *ante litem*, the new vendee should be added as a party before the plaintiff can succeed against him. A decree obtained against the first vendee is ineffectual against the second vendee.

If the second vendee is not impleaded in the first suit it has been held (a), that the plaintiff cannot sue him in a subsequent suit even when successful against the first vendee, and (b), that he can sue if in time,

(i). P. R. 146 of 1883.

When a decree for pre-emption has been obtained in respect to a prior sale and has become final, a suit for pre-emption cannot be maintained in respect to a subsequent sale by the purchasers at the prior sale to a third party, even if the first decree-holders are impleaded.

(ii). C. A. 372 of 1905, P. R. 106 of 1907.

Where the subject-matter of a pre-emption suit has been assigned by the original vendee before the pre-emptor has instituted his suit, the latter is not entitled to recover from the transferee on the strength of a decree he obtains against the vendee alone. In order to obtain the property from the transferee he is bound either to implead the latter as a party to his original pre-emption suit or institute a fresh suit within the period of limitation under article 10.

But see "Limitation" as to the article applicable.

6. Where a sale deed is ostensibly in favour of certain vendees, and it is alleged there were others also interested in the bargain, it is unnecessary to implead those others.

P. R. 108 of 1895.

It is clear that the vendees whose names were entered in the deed of sale were alone the parties who need have been impleaded as defendants, and it is admitted they were all so made in the first instance. The other defendants who purchased through them were not necessary parties, and it is therefore immaterial when they were brought on the record.

7. Where the vendee has, after the sale, mortgaged the property, the mortgagee is not a necessary party, P. W. R. 55 of 1912.

V.—IMPLEADING OF RIVAL PRE-EMPTORS.

A.—In Original Court.

The first part of section 28 reproduces the old rule of procedure whereby rival pre-emptors should be cross-impleaded as defendants in each other's suits.

The provision runs :—

"When more suits than one arising out of the same sale are pending the plaintiff in each suit shall be joined as defendant in the other suits."

Sale of course here includes foreclosure.

It is unnecessary to give instances of the practice prevailing before this legislative enactment. The procedure arose in the present United Provinces, and though its legality was at times questioned, the general convenience of the method was recognized, and developed into a well known rule of procedure.

B.—In the Appellate Court.

Earlier rulings were to the effect that an unsuccessful pre-emptor, where a decree had been granted to a rival pre-emptor, could not succeed on appeal by merely appealing in his own case. It was held that he must also appeal in the case in which his rival had been successful.

This earlier view has not been dissented from in the Allahabad Court, but in the Punjab it has been held that it is not necessary for him to appeal in both cases.

Earlier rulings :—

(i). X All. 123.

In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment but by separate decree. In one of the suits the pre-emptor obtained a decree in the terms of section 214, C. C. P. In the other the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it.

The decree in the first suit was not appealed against and became final. The second pre-emptor appealed from the decree in his own suit on the grounds that the amount ordered to be paid was excessive, that the first pre-emptor had lost his right and the decree in the second suit should not have been made subject to the conditions above stated.

Held, the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, and that that decree having become final the questions between the two pre-emptors could not be re-opened on appeal from the second pre-emptor's decree.

(ii). P. R. 8 of 1904.

T instituted two suits for pre-emption with respect to two sales of land. Four days later G did the same, eventually each pre-emptor was made a defendant in the other's suits. The first Court framed similar issues, and heard one set of witnesses in all 4 cases and disposed of all in one judgment.

T was held to have a preferential right to G and similar decrees were drawn up in all the cases by which T was directed to pay the price in a certain time, and on his default G was to get the property on payment of the prices in another fixed time. G appealed only in the two cases in which he was plaintiff.

Held, the omission to appeal against the decree of the rival claimant was a fatal defect, which having become final and binding, operated as *res judicata* between the two pre-emptors.

(iii). A. W. N. 1887, p. 301.

Judgment to same effect.

(iv). XXXIII All. 52.

Where there were two rival pre-emptors M and L, the plaintiffs being cross-impleaded, and M got a decree, L's claim being dismissed, held an appeal by L was barred by *res judicata* in his own case, when he had not appealed against M's decree, which in consequence had become final.

Later ruling :—

(i). P. R. 85 of 1905 F. B. expressly overruling 8 of 1904.

Two identical suits for pre-emption were filed by two rival pre-emptors against the same defendant, and each pre-emptor was impleaded as a defendant in the other's suit. Similar issues having been framed in each case, both were tried together and disposed of by one judgment and decree. In one of the suits the pre-emptor was held to have a preferential right over the other, and a decree was passed giving him the right to pre-empt within a certain time and to the other on his failure to do so. The unsuccessful pre-emptor appealed from the decree in his own suit, and the appeal was thrown out by the Divisional Judge on the ground that the omission to appeal against the decree of the rival claimant was a fatal defect and operated as *res judicata*.

Held :—It was not necessary for the unsuccessful pre-emptor to file an appeal in each of the two cases, and the Court of Appeal was not precluded under the rule of *res judicata* from going into any matter common to the two cases by reason of the finding in the cross case not having been appealed against.

C. Closely connected with this subject is the case where an inferior pre-emptor has already got a decree. In such a case all that it is necessary for him to do is to sue the original vendor and vendee, making the inferior pre-emptor a party also.

It is unnecessary to sue to have the inferior pre-emptor's decree set aside.

P. R. 139 of 1894.

A right to pre-empt is a personal privilege which can only be lost by one's own act, exhaustion by suit or limitation and not by decree in another's favour to which he was not a party, therefore if B holds a decree for pre-emption, and A who has a superior right then sues, it is not necessary to sue to set B's decree aside.

VI.—MISJOINDER OF PLAINTIFFS.

1. For joinder of claimant entitled to pre-empt in a suit with a claimant not entitled to pre-empt, see Chapter IV (p. 164).

2. Plaintiffs not having a *joint* right to pre-empt cannot join together in one suit simply because they each have individual rights to pre-empt,

(s). P. R. 3 of 1881.

It is not competent for two proprietors in a village, each entitled to claim pre-emption on the sale to which the suit relates but not having a joint

right of pre-emption to institute a single action as co-plaintiffs. The proper course for a Court of first instance to adopt, when such an error in the frame of the suit is brought to its notice, is to order the name of one of the plaintiffs to be struck out under section 32, C. C. P., before going on to investigate the case on its merits.

The case, however, should not be dismissed even if the point has gone to issue.

(ii). P. R. 29 of 1892.

Rivaz, J. :—P. R. 3 of 1881 has ruled that unless all the landowners of a *patti* combine to make a joint claim under section 12 (a), Punjab Laws Act, two or more of their number cannot join in a single suit for pre-emption, such suit being open to the objection that in it different plaintiffs have combined distinct causes of action, but this does not prevent individuals coming in under clause (d). Hence if two persons out of a number are entitled to sue, they must sue separately.

(iii). P. R. 29 of 1894.

A suit by two individual plaintiffs, each entitled to claim pre-emption, but not having a joint right of pre-emption, is bad for misjoinder and the Court should order the name of one of the plaintiffs to be struck out under section 32, C. C. P. If one of such plaintiffs withdraws from the suit, there is no legal impediment to the suit proceeding and decision being arrived at on the respective rights of the remaining plaintiff and the purchaser.

A contrary view seems to have been taken in—

P. R. 19 of 1898.

Where several occupancy tenants were entitled to sue, it was held unnecessary for them all to sue to establish the right; further that any number of them could join in one suit, it being unnecessary for them to bring separate suits, when it was clear they could sue separately and intended to divide.

But this case is a peculiar one and was one where several occupancy tenants were entitled to pre-empt their own tenures and instead of each suing separately they joined together, each tenant merely desiring to pre-empt his individual tenure.

VII.—MISJOINDER OF DEFENDANTS AND CAUSES OF ACTION.

1. For joinder in purchase of person entitled to pre-empt with person not entitled to pre-empt, see Chapter IV (p. 159).

2. Where there are separate sales to the same vendee in different villages at the same time, they cannot be sued for together.

W. R. 1883, p. 230.

If in one suit to pre-empt a claim be laid for properties in two different villages sold by separate deeds, the suit is bad for misjoinder.

3. Where there are coincident sales of different properties in the same village to the same person they can be sued for together.

XVII All. 274.

Where a *zamindari* share and the *sir* land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, held,

a suit to pre-empt both was not liable to be defeated on the ground of misjoinder of causes of action.

4. Separate sales by different co-sharers in the property sold to one and the same vendee can be sued for together.

XXXII All. 14.

Where there are different sales by different vendors to one vendee all can be tried in one action.

Contra :—

VI All. 106.

A and B, co-sharers in a village holding separate shares, sold their shares separately to C. D, another co-sharer in the village, sued to pre-empt both sales in one suit.

Held, the suit was bad for misjoinder of defendants and causes of action, and the suit was properly dismissed on that ground as the matter had proceeded to issue and trial.

The vendee defendant was competent to take the objection himself.

5. Where three vendors separately convey their rights to a fourth, a pre-emptor entitled to pre-empt all sales can sue for them together, but if the sales are to separate persons he cannot do so.

(i). IV All. 163.

The sons of R, K and S, possessed proprietary rights in two *mahals* of a certain *manza*. Plaintiff possessed proprietary rights in one of those *mahals* only.

In April 1879 the sons of R sold their proprietary rights in both *mahals* to G. In August 1879 the sons of K did the same, and in the same month the sons of S sold their proprietary rights in both *mahals* to one N.

G sued to pre-empt the sale to N and got a decree. Plaintiff then sued to enforce a right of pre-emption in respect of the 3 sales mentioned above, so far as they related to the *mahal* of which he was a co-sharer, joining as defendants G and N and the vendors to them.

G alone objected to the frame of the suit in the 1st Court. The Court overruled the objection and gave plaintiff a decree, and the Lower Appellate Court reversed the decree on the ground of misjoinder.

Held, that in respect to G there was no misjoinder, but that in respect to the other defendants there was misjoinder of both causes of action and parties, but as the defect did not affect the merits of the case or the jurisdiction of the Court and G alone objected, the Lower Appellate Court ought not to have reversed the decree of the first Court on this ground alone.

(ii). XXXII All. 14.

Of the four owners of undivided shares in immoveable property three sold their interest in the property, and the fourth sold his interest separately at a later date to the same vendee. A pre-emptor sued for pre-emption on the basis of both these transactions, impleading as defendants the vendors and a rival pre-emptor as well as the vendee.

Held, that the suit was not bad for misjoinder of either causes of action or parties.

Further if there had been misjoinder the Court should have amended the plaint and allowed the plaintiff to proceed with the claim in respect of one of the sales.

VIII.—ESTOPPEL OF DEFENCE.

1. A defendant in a redemption suit cannot urge that an ostensible mortgage was in effect a sale, but was given that form in order to defeat pre-emptors.

P. R. 99 of 1895.

Plaintiffs, alleging themselves to be purchasers for value of the equity of redemption of a mortgage of a house executed in favour of defendant, claimed redemption from the latter for Rs. 1,400, the full amount of the mortgage money. Defendant pleaded that the house was really sold and not merely mortgaged to him, a mortgage deed being executed instead of a sale deed to avoid pre-emption.

Held, plaintiff having purchased, for value from the representatives of the original mortgagors, the equity which according to the deed still remained vested in them, and there being nothing on the record which deprived plaintiffs of the character of *bona fide* purchasers for value or indicated that they had any notice that the vendor had no interest left to dispose of, the mortgagee was estopped from urging, as against them at any rate, that the transaction was other than it purported to be.

2. The fact that the vendee has lost since sale the property which would have entitled him to pre-empt does not prevent him urging his rights in respect of such property at the time of the sale.

P. R. 44 of 1903.

A vendee-defendant having rights of pre-emption on the ground of vicinage does not forfeit them if he parts with his own property through which he had the rights immediately after the purchase and can set up those rights in defence of his purchase.

3. The mere fact that a defendant asserted he had sold certain property will not prevent him proving there was no sale on a suit to pre-empt the alleged sale.

P. R. 61 of 1895.

Plaintiff sued to pre-empt relying on the statement of defendant 1 before the patwari and recorded in the diary that he has sold his interest to his wife for Rs. 15,000. The entry was made in the *naqsha intiqal* and attested by the Kanungo in the absence of the parties to the alleged sale. Defendant pleaded there had been no sale, that the entry was fictitious and no consideration had passed, and that the transaction had been made colourably to evade certain creditors' claims. Plaintiff urged defendant was estopped from pleading his own fraud, and could not go behind his own statement before the Revenue authorities. Held, there being no proof of the actual transaction beyond the defendant's admission, though it threw the *onus probandi* on him, was not conclusive proof unless it operated as an estoppel, nor did the fact that defendant had to allege his own fraud in order to show no sale had taken place preclude him from showing the real nature of the transaction. As to estoppel, inasmuch as plaintiff had not been made to act on defendant's statement, defendant could not be held to his statement to his detriment.

4. A mortgagee who has foreclosed cannot urge that the foreclosure proceedings were irregular.

P. R. 155 of 1882.

It was urged on behalf of the conditional mortgagee that no claim for pre-emption could lie, because the proceedings to foreclose were irregular, the result of which would be that, as between the mortgagor and mortgagee, the land must still be deemed to be held in mortgage and liable to redemption, with respect to which no pre-emption suit would lie.

It appeared that the mortgagee, instead of following the procedure of the Regulation, brought a regular suit for proprietary possession of the mortgaged land, and got a decree conditional on the mortgagor failing to pay by a specified date the sum due. The mortgagor failed and the mortgagee executed the decree and was placed in proprietary possession. No appeal was lodged and the mortgagee had been in possession ever since then.

Held, the mortgagee was estopped from raising the contention, the mortgagor's conduct in not appealing and in allowing execution and his failure to appeal also in the present case against plaintiff's decree showed he had acquiesced in the sale being made absolute, and this being so, the mortgagee could not repudiate a title adjudicated in his favour at his own instance in order to deprive plaintiff of his right of pre-emption which arose in consequence of that title being made absolute.

5. A vendee who is prepared to sell to the pre-emptor at the price he himself paid before suit is not estopped in the suit.

P. R. 67 of 1906.

In reply to a notice of a person claiming pre-emption, if the vendee says the claimant can have the house on payment of the full amount paid by the vendee plus improvements that is not an admission of the right of pre-emption amounting to estoppel.

IX.—NOTICE.

The present law regarding notice is contained in sections 19 and 20 of the Act which reproduce *verbatim* sections 16 and 17, Act II of 1905.

The old law on the subject was contained in sections 13 and 14 of the Punjab Laws Act.

Under the Punjab Laws Act the vendor was bound to give notice of his intention to sell to the pre-emptor, mentioning therein the amount he was selling for, and such notice must be given through the Court. If within 3 months of the receipt of the notice the pre-emptor did not pay the amount claimed or prefer what he considered a fair price, he lost his right of pre-emption.

If the vendor failed to give notice, the pre-emptor was entitled to come into Court to enforce his right of pre-emption within limitation.

Under the present law the issuing of a notice is not obligatory, but the vendor may give notice through Court, and if the pre-emptor does not within 3 months from receipt of notice, or within such further time, not exceeding one year, as the Court may direct, present to the

Court a counter-notice expressing his intention to enforce his right of pre-emption and the price he is willing to pay, he loses his right of pre-emption.

The law is a reasonable alleviation of the Muhammadan rule of law that immediate demand must be made by the pre-emptor.

A method is provided by which proof of knowledge may be easily given, and a reasonable period and proper form laid down for the making of the demand by the pre-emptor.

The following rulings lay down certain principles applicable to notices:—

1. The notice must be given through a Court having jurisdiction where the property is situated, and must be through Court.

(i). P. R. 155 of 1882.

A notice given through a Court within whose jurisdiction the property was not situate is insufficient.

(ii). Section 19 part 2.

(iii). P. R. 24 of 1887.

A written notice through Court is required by section 13, Punjab Laws Act.

(iv). P. R. 90 of 1887.

The second clause of section 13 means that a notice to be valid must be given through a Court.

2. An oral notice does not fulfil the requirements of the section, and consequently an omission to reply to an oral notice would not affect the pre-emptor's right.

The rulings are all under the Punjab Laws Act, when notice was obligatory. Under the present Act notice is not obligatory, but the effect and form of notice are not affected by that fact.

(i). P. R. 52 of 1880.

The mere omission or refusal to accept an oral offer of sale does not, by itself and without some positive act of the pre-emptor by way of discharging the vendor, constitute a waiver of the right of pre-emption or dispense with the performance of the obligation to serve a written notice as provided in section 13.

(ii). P. R. 113 of 1881.

An offer made is not a notice under section 13, Act XII of 1878.

(iii). P. R. 112 of 1882.

In the absence of some positive act of waiver on the part of the pre-emptor discharging the vendor from the obligation imposed on him by the law of

giving the pre-emptor formal notice of the intended sale, the mere refusal to accept an oral offer is not sufficient defence to a subsequent action by a pre-emptor to enforce his legal rights.

(iv). P. R. 155 of 1882.

Mere refusal by a pre-emptor to take up a mortgage on the oral offer of the mortgagee during foreclosure proceedings does not, in the absence of the legal notice required by section 13, apart from any other positive act of waiver by the pre-emptor, debar him from re-asserting his right to pre-empt within time.

In the suit it was urged by the mortgagee that plaintiff's suit was not maintainable as he had refused to take over the mortgage, and it appeared at the time of foreclosure proceedings plaintiff was asked by the mortgagee if he was inclined to redeem the mortgage, plaintiff declining as he was in debt.

It was held, such notice did not fulfil the conditions of section 13.

(v). P. R. 24 of 1887.

An oral offer of the bargain and a refusal by the pre-emptor is not enough by itself to dispense with the duty of serving a written notice through the Court as required by section 13, Punjab Laws Act, so as to estop plaintiff from claiming pre-emption subsequently on the ground that he has waived his claim.

3. The notice must contain a specification of the amount claimed or due on the footing of the mortgage.

(i). P. R. 155 of 1882.

Under section 13, Act IV of 1872, the mortgagee is bound to give notice to the person entitled to pre-empt of the amount due in respect to the mortgage and failure to do so renders the notice not a legal notice.

(ii). P. R. 22 of 1901.

The absence of specification of price demanded in a notice under section 53, Tenancy Act, prevents its being effectual under section 13, Punjab Laws Act.

(iii). Sec. 19, Pre-emption Act, I of 1913.

Of. also

VI All. 463.

The only mode in which a pre-emptive claim can be defeated is by proof of a distinct intimation to the co-sharer seeking to maintain it of the contemplated sale and of the price to be paid by the stranger, of an offer to him at such price, and of his refusal to purchase.

4. A proclamation by the Tahsildar, under the directions of the Court, by affixing the same on the *chaupal* or other public place in the locality of the property, is sufficient service of the notice.

(i). Section 19, part 2.

(ii). P. R. 90 of 1887.

A notice issued through a Tahsildar and stuck up in *chaupal* of a village is sufficient notice within the terms of section 13, if it complies in other respects with the requirements of that section.

(iii). P. R. 22 of 1901.

P. R. 90 of 1887 approved of.

Contrast with

VI All. 463.

Where the sale was by the Court of Wards, and before the sale a proclamation was made through the Tahsildar notifying all shareholders that the property was for sale, and asking the claimants to offer prices, held, that that was not such distinct and definite notice of a negotiated and intended sale so as to estop the co-sharers who made no offer from afterwards asserting their pre-emptive rights.

5. The rules *re* notice apply equally to foreclosure proceedings as to sales.

(i). *Vide* sections 19 and 20.

(ii). P. R. 35 of 1881.

In a pre-emption suit under Act IV of 1872, if a mortgagee was taking measures to foreclose under the Regulation, he was proposing to foreclose a mortgage within the meaning of section 13, and he was bound to give notice of the amount due in respect of such mortgage to the person having the right to redeem under section 14. It is not necessary under the same Act that notice of foreclosure proceedings should be served upon the person having the right of pre-emption.

6. Mere intimation of intention to sell is not notice.

P. R. 60 of 1887.

A mere notification in general terms by a proprietor of land of his intention to sell without mentioning the price is not sufficient notice.

7. The issue of a notice by a vendor, when it is not acted upon by the pre-emptor, does not fix the vendor to the price mentioned therein.

P. R. 30 of 1897.

When a vendor issues notice of his intention to sell, he does not thereby deprive himself of his right to realize for his property any price which the vendee is prepared to pay in good faith or agrees to pay.

The only effect of such notice is to reduce the period of limitation, or possibly to extinguish the pre-emptor's right altogether, if he refuses to buy at the price named, and it is found that the price was fixed in good faith.

8. The date of given notice is excluded in computing the 3 months.

P. R. 114 of 1891.

In reckoning the three months, within which in pre-emption cases a person having a right of pre-emption may pay or tender the price to the vendor, or in case of mortgage the amount due to the mortgagee, the day on which the notice is given is to be excluded.

9. The notice must be by the vendor and not by the vendee.

(i). Section 19, Pre-emption Act.

(ii). P. R. 55 of 1873.

In a pre-emption suit, if notice under section 13, Act IV of 1872, has not been given by the vendor, the plaintiff is entitled to a decree, although he may have received notice from the vendee.

10. A reply to a notice must state whether the pre-emptor accepts the price or amount due on the footing of the mortgage as correct or not, and if not what sum he is willing to pay.

(i). Section 20, Pre-emption Act.

11. The reply to a notice cannot be made in a plaint in a pre-emption suit.

P. R. 46 of 1883.

If within three months from receipt of notice required by section 13, plaintiffs claiming pre-emption expressed in their written plaint their willingness and readiness to pay whatever the Court might fix as a fair price, held, the plaintiffs had not complied with the requirements of section 14, it being impossible to hold that a mere expression of willingness to pay as above was equivalent either to a payment or a tender, for to constitute the latter there must be an actual production of the money, unless the production is dispensed with by an express declaration or equivalent act of the creditor.

12. Failure to reply to the notice, and mere sitting on the right to pre-empt is waiver.

(i). Section 20, Pre-emption Act.

(ii). VII All. 23.

Plaintiff, in a suit to enforce the right of pre-emption, alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor, after he became aware of the negotiations, nor did he make it known to him that, while he stood upon his pre-emptive rights, he declined to pay the price stated in the sale-deed because it was not the consideration agreed upon between the vendor and vendee.

Held, plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price in a reasonable time, and that not having done so, he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre-emption.

(iii). P. R. 35 of 1881.

If a person, having a right of pre-emption, being aware of the fact that a mortgagee is engaged in foreclosure proceedings and having received notice from the mortgagee of the amount due on the mortgage, refuses to avail himself of the implied offer of pre-emption, he could not afterwards maintain a suit against the mortgagee to enforce his right of pre-emption.

(iv). XI All. 108.

On receipt of notice, if the co-sharer takes no action thereon in a reasonable time, held, as his inaction would lead the vendor to conclude he would not interfere or become a purchaser, it was equivalent to declining to purchase.

Contra :—

XVI All. 247.

Where the plaintiff has received notice of sale after the sale, and has given no reply to it, and has remained silent, he cannot be held to have acquiesced in the sale.

13. The notice must be on the person entitled to pre-empt, whether the transaction be a sale or foreclosure.

Section 17, Pre-emption Act.

(NOTE.—P. R. 35 of 1881 (p. 301) which limits the notice to the person entitled to redeem in case of foreclosures is *pro tanto* no longer law.)

14. The notice to a pre-emptor in foreclosure must be given before the foreclosure is completed.

(i). P. R. 155 of 1882.

An offer to the pre-emptor to take over a foreclosure of a conditional sale would be insufficient if made, not when the mortgagee proposed to foreclose the mortgage, but when the foreclosure had been actually completed by a decree of Court and possession transferred to the mortgagee.

(ii). P. R. 90 of 1887.

The notice must be given some time previous to the mortgage being foreclosed.

15. After giving notice the intending vendor is not bound to sell.

See P. R. 30 of 1897 (p. 93).

16. Section 20 does not require any payment or tender by the would-be pre-emptor as the old law did. His duty is sufficiently discharged by giving the reply required by that section.

X.—CONDITIONS PRECEDENT TO SUCCESS.

1. Section 20 of Act II of 1905, gave three formal issues which must be decided by the Court hearing a case to pre-empt agricultural land. The object of these issues was to ensure the due observance of the restrictions on alienation laid down by the Land Alienation Act.

It was not sufficient that the parties themselves were not at issue on the matters involved, because it was always possible that they might collude amongst themselves so as to render the Alienation Act inoperative.

2. The present Act attains the same end in sections 23, 24 by providing that no decree shall be granted in respect of the sale of agricultural land until the plaintiff has satisfied the Court that the sale does not contravene the Land Alienation Act, and that the pre-emptor is not debarred from pre-empting under section 14, and if the Court finds the sale does contravene the Land Alienation Act it must dismiss the suit.

A further safeguard is provided in section 29, which provides that a copy of every decree in a case dealing with agricultural land or village immoveable property shall be sent to the Deputy Commissioner, whose duty it also is to see the Land Alienation Act has not been contravened.

It is not quite clear why a decree relating to village immoveable property should be included in section 29, as Act XIII of 1900 does not prohibit the permanent alienation of village immoveable property, but possibly the object is to enable the Revenue authorities to be satisfied that agricultural land is not being sold under the guise of village immoveable property.

3. The wording of the sections is so clear as to need no commentary.

XI.—ISSUES.

1. Under Issues reference should be made to a point dealt with in the Chapter on "Price Payable and Market Price."

As is noticed in that chapter the primary issue is "Was the sum alleged to have been fixed or paid so fixed in good faith or paid?" and it is not until that issue has been determined in the negative that it becomes necessary to decide the issue "What is the market-price?", though the question of market price is a relevant piece of evidence to determine whether the price alleged to have been paid has actually been paid.

2. It should also be noted in this connection that a person seeking pre-emption, who is otherwise entitled to object to a sale on the ground that it was made without necessity, is not entitled in a pre-emption suit to an adjudication on the question of necessity. The reason of this is that in suing for pre-emption he admits that there has been a valid sale.

There is only one ruling on the subject, and that is meagre but the defence is one that is never raised so far as my experience goes.

P. R. 54 of 1882.

The plaintiffs do not urge that they are entitled to a decision as to the existence of necessity for the sale.

3. In regard to *onus*.

The *onus* of proving a transaction is not a sale is on the pre-emptor (see p. 233).

The *onus* of proving a right to pre-empt is on the person alleging it.

The *onus* of proving a custom is on the person alleging it (p. 210).

The *onus* of proving waiver is on the person alleging waiver.

The *onus* of proving the price payable is not the price stated by the vendor and vendee, is on the pre-emptor, though it is one that is easily shifted, according to the better authorities, but the Chief Court has recently placed the initial *onus* on the vendor.

(See Market price and price payable.)

XII.—PAYMENT OF DEPOSIT INTO COURT AND RULES AS TO DISPOSAL.

1. The law relating to preliminary deposits is contained in sections 22 and 11 of the Act.

Section 22 is now obligatory on the original Court and optional with the Appellate Court.

Under the Punjab Laws Act it was within the province of the Court to demand at any time a deposit in Court of any sum it considered approximate to the value of the property in dispute.

But it was not compulsory on the Court to demand any deposit.

Under the present law the original Court must, at or before issues, demand the deposit by the plaintiff of such sum as does not in the Court's opinion exceed one-fifth the value of the property, or security for the payment, if required, of the whole of such probable value in such time as the Court may fix, and the Appellate Court is given authority to exercise the same power at any time during the course of appeal.

2. The object of this section is to prevent speculative suits, or suits brought simply with the intent of worrying the vendor in the hope of getting him to pay the pre-emptor something in order to induce him to drop his claim. The payment of a deposit is an attempt to ensure some guarantee of *bonâ fides* in the suit or appeal.

3. The sum so deposited cannot, under section 11, be attached in the execution of a decree, but it is available in the particular case to meet the costs granted to the other side. As costs are part of a decree, so far there would appear to be a conflict between sections 11 and section 20, but section 11 only applies to decrees obtained against the pre-emptor in other suits.

4. Section 20 (4) also provides that failure to make the deposit in the time fixed by the Court or such time as the Court may further allow, or failure to furnish the alternative security, involves the rejection of the plaint in the first Court or dismissal of the appeal in the Appellate Court.

The power to extend the time is an innovation in the present Act but follows the interpretation put on section 19 (3), Act II of 1905, in

P. R. 78 of 1909.

Under section 19 of the Punjab Pre-emption Act of 1905, the Court has power to extend the period fixed by it even after expiry of that period, provided

(1) that the Court should not extend the period save for good and sufficient reason.

(2) that in any event the extension of the period cannot in certain cases suffice to bring a claim within limitation when it would, save for such extension, have been barred by limitation.

"We cannot read this provision as mandatory in the sense that the Court must once and for all fix the time within which its order is to be obeyed, and that it has no power thereafter to extend the said time."

But—

The Court should not extend the time when once the pre-emptor has put itself in the wrong by refusing to file the deposit on a fixed date under the belief the Court's order as to the amount was wrong.—P. W. R. 169 of 1912.

5. The rejection of a plaint, it should be noted, allows the bringing of a fresh suit subsequently if in time, and in employing clause (4) in the first Court care should be taken simply to reject the plaint, and not order the dismissal of the suit.

On appeal, however, the provision in default is a dismissal of the appeal—compare also para. 7 *infra*.

6. It should also be noted that if the plaintiff makes the deposit then loses his case, and pending appeal withdraws the deposit, the appeal must be dismissed. This also is a new provision rendered necessary by the rulings C. A. 23 of 1907 and P. R. 58 of 1912.

7. Section 22 (4) (b), also gives both the original or Appellate Court power to demand fresh or increased security, when the security already filed becomes void or insufficient, and on failure to comply with such requisition, the result is that the suit or appeal shall be dismissed.

It is peculiar that the only effect of failure to comply with the original order of the first Court is a rejection of the plaint, which, as noted in para. 5 above, does not bar a fresh suit, while a failure to comply with a subsequent requisition involves a dismissal of the suit or appeal.

8. The last point to note in the section is, that the estimate for the purposes of determining the amount of the deposit is not a judicial finding in any way affecting the ultimate price to be paid.

Section 22 (5) uses the words "market value," but what is meant is the "price payable."

9. The latest time at which the first deposit can be demanded in the first Court is at the time of issues. Under the Punjab Laws Act the power being discretionary in the Court, it was decided by reference to sections 53, 54, C. C. P., that the demand could not be made after issues, although the Punjab Laws Act was silent on the point. Under the present Act the duty is obligatory, but should the Court, by oversight or otherwise omit to exercise its power before or at the settlement of issues, the same reasoning will apply to prevent its demanding deposit afterwards.

The ruling *mutatis mutandis* is still applicable,

P. R. 52 of 1891.

Plowden, J. :—

In a suit for pre-emption the latest stage at which the Court may make an order under section 16 A, Punjab Laws Act of 1872, requiring the plaintiff to pay into Court the price or market value of the property, is up to the time the issues are settled, and not afterwards, because the penalty is rejection of the plaint and under C. C. P. sections 53, 54, rejection cannot be made after the settlement of issues.

The power of rejecting a plaint contained in section 16 A is supplementary to the provisions of the C. C. P. and must be read with the Code.

This, of course, does not apply to the Appellate Court, which is given statutory powers to demand at any point in the proceedings, nor does it apply to requisitions for new or an enhanced security under clause 4 (b).

10. A reasonable time should be given to the plaintiff for depositing. What is a reasonable time is a question to be determined with reference to the circumstances of each case.

C. A. 1452 of 1900.

In fixing the time for payment of money into Court, the Court should not consider whether or not the plaintiff had the money, but reasonable time should be allowed, taking into consideration the amount and all the circumstances of the case.

11. If instead of depositing in the time fixed, the plaintiff appeals and fails in his appeal the Court would be quite correct in rejecting the plaint on the expiry of the period fixed.

C. A. 391 of 1902.

Before issues were framed plaintiff was ordered to deposit the pre-emption price in 22 days. Instead of doing so he appealed against the order unsuccessfully. After the rejection of the appeal the original Court rejected the plaint for default in deposit.

Held, the order was correct.

12. The amount of deposit includes one-fifth of the value of improvements *bonâ fide* made *ante litem* when the pre-emptor has stood by and not attempted to stop the buildings.—P. W. R. 169 of 1912.

But see P. W. R. 66 of 1908 where an opposite view is taken, I think, erroneously.

XIII.—FORM OF DECREE.

1. Though a partial direction as to the form of decree is given in section 28, the law as to the form of decree in pre-emption suits is contained in Order XX, rule 14, C. C. P., which replaces section 214 of the old Code.

It should be noted that the term "sale" employed in this section must be taken to include the term "foreclosure."

The section now reads :—

(1). Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

- (a) specify a day on or before which the purchase-money shall be so paid, and
- (b) direct that on payment] into Court of such purchase-money together with the costs, if any, decreed against the plaintiff on or before the date referred to in clause (a), the defendant shall deliver possession to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment but that, if the purchase-money and the costs, if any, are not so paid, the suit shall be dismissed with costs.

(2). Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect, and
- (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

2. The section is a very great advance on section 214 of the old Civil Procedure Code, and embodies as statutory law the leading decisions as to procedure passed by the various High Courts.

The whole question of the payment of purchase-money is dealt with *infra* (p. 314).

3. The following general points should be noted :—

(1). In all cases the Court must fix a date on or before which payment must be made. It should not, as is so commonly the case, fix a period ; the date should be a specific date.

P. R. 48 of 1906.

It is the correct course under section 214, C. C. P., to name a day for payment.

(2). The Court should direct that failure to pay the purchase-money in the fixed time involves the dismissal of the pre-emptor's suit with costs.

Under the Code of 1877 it was provided that failure to pay the purchase-money in time meant that the decree in the pre-emptor's favour became null and void, and this phraseology is still erroneously adopted by many Courts. Care should always be taken to comply with the provisions of the section on this point.

4. The section gives rules as to decrees in two cases, *viz.*

(a) where there is a single pre-emptor entitled,

(b) where there are rival pre-emptors entitled.

In the first case the decree is simple. It should state—

- (i) in whose favour it is decreed,
- (ii) the property decreed,
- (iii) the amount of the purchase-money and costs, if any, awarded against the pre-emptor,
- (iv) the person against whom the decree is passed,
- (v) the amount of costs awarded to the pre-emptor, if any,
- (vi) the date on or before which the purchase-money and costs must be paid,
- (vii) that on such payment the defendant shall deliver possession to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment,
- (viii) that in case of failure to pay the purchase-money and costs on or before the date fixed, the plaintiff's suit shall be dismissed with costs.

In the second case, there are two sets of circumstances which may arise, but in both the matters above mentioned should be included in the decree.

The two sets of circumstances are :—

(1). Where the rival pre-emptors are entitled to divide the property, that is, where they are *inter se* equally entitled to take the property in proportionate shares.

In such a case the decree should state in addition to the above :—

- (i) the shares each is entitled to, and the proportionate amount of the purchase-money and costs each is liable to pay,
- (ii) that in case any one of the equally entitled pre-emptors fails to deposit his share of the purchase-money and costs, the other or others of the successful pre-emptors shall be entitled to such share on the payment of the defaulter's proportionate share of the purchase-money and costs, within such further time as the Court direct, such time being also up to a fixed date.

(2). Where two or more pre-emptors have a superior right to the vendee, but *inter se* the right of one to the whole property is superior to the others.

In this case it should be provided that, if the superior pre-emptor fails to deposit the purchase-money and costs in the time fixed, his suit shall be dismissed, but that the next entitled pre-emptor (and so on till all the pre-emptors are exhausted) shall be entitled to possession of the property, on payment of the purchase-money with costs on or before a further specified date.

I should note here that the section does not provide for the fixing of a further date where default is made by the first pre-emptor, but this is simply an omission, and without such being done the decree would be a nullity. Moreover the practice is a well-established one.

The old rulings embodied in this section, which do not require reproduction, are—

(1). In reference to equally entitled pre-emptors.

I All. 291, VI All. 370, X All. 182, IV A. W. N. 119, P. R. 83 of 1888.

(2). In reference to superior and inferior pre-emptors.

P. R. 83 of 1888, VI All. 370, and IV A. W. N. 119.

Prior to the enactment of section 214, C. C. P., it was held that the Court had no power to fix conditions as to time (VI W. R. 43, I All. 293, Stuart, J.) though the practice was followed by the High Court itself in I All. 132, I All. 291, S. D. A. N. W. P. vol. II 312, and S. D. A. L. P. Summary Cases 132. The point is, however, now purely of academical interest.

5. We have seen that provision is to be made, when there are equally entitled pre-emptors, that each is to pay his proportionate share of the purchase-money, and that in default by anyone the other or others shall be entitled to pay the defaulter's share and take the benefit of his decree.

Suppose, however, there are two equally entitled pre-emptors, and both make default in their proportionate share. Would they be entitled to pay the default of each other in the further time fixed? The answer is that they would not.

X All. 182.

In two rival suits for pre-emption, the Court gave one claimant a decree for a 3 anna share and the other for $2\frac{1}{2}$ anna share of certain property, each decree being conditional on payment of the price in 30 days. The Court further directed that, in case of either pre-emptor making default within the 30 days, the other should be entitled to pre-empt his share on payment of the price thereof within 15 days of such default.

Both pre-emptors made default within the 30 days. One of them, within the further period of 15 days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held, the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt.

6. The following further points should also be noted :—

(1). In case the vendee is found entitled to compensation for *bonâ fide* improvements, separate provisions in the decree should be made for the sale-price and such compensation.

P. R. 91 of 1892.

The decree in such cases should provide separately for the payment of the pre-emption money and the payment of compensation, and the payment of the former within the time fixed should save the decree from forfeiture even though compensation be not paid.

This was a case where the purchase-money was Rs. 300, and the compensation for improvements was Rs. 1,845-11-0.

(2). The period for payment should be a reasonable one. No rule is laid down as to how distant a date should be given, but as a rough guide it may be laid down that the date fixed should not be less than a fortnight from the date of decree or more than three months. It will be found that in all the Chief Court rulings and High Court rulings the period allowed lies between those two.

See P. R. 1 of 1885.

Ten days seem to be a very short time to be allowed for payment of the money.

(3). Omission to fix a date does not render the decree inoperative.

See P. R. 10 of 1895. Payment of purchase-money (p. 320).

(4). Omission to state in decree what will be the effect of failure to pay deposit does not render the decree inoperative, the decree-holder's failure to pay renders his decree incapable of execution.

See Payment of Purchase-money,

XIV.—PLEADERS' COSTS.

1. These should be allowed in the decree on the price found to be payable, not on the amount at which pre-emption was claimed.

I All. 709.

In a suit for pre-emption where it was found by the Court that the actual price was less than the price stated in the deed of sale, and the Court gave plaintiff a decree with costs, held, that the amount payable by the defendant in respect of the fees of the plaintiff's pleader ought to be calculated, not on the valuation of the property which was found to be false or on the amount on which Court-fees on the plaint was paid, but on the real value of the property as found by the Court.

Court-fees had been paid on Rs. 1,370-5-0. Value for jurisdiction and the price stated in the sale deed was Rs. 6,000. The actual price found due was Rs. 2,300. Pleader's costs were allowed on Rs. 2,300.

2. In determining liability as to costs the Court is entitled to exercise its discretion. The following simple guides, which are only partly based on legal decisions, may be of assistance :—

- (i). If the claim fails on any ground, the claimant should pay all costs.
- (ii). If the claim succeeds in its entirety, the defendant should pay all costs.
- (iii). If the defendant only resists the claim on the ground that the pre-emptor does not and has not offered the proper price, but has offered a sum largely below the proper price and the price claimed by the defendant is the proper price, plaintiff should be made to pay defendant's costs. P. W. R. 192 of 1911.

(iv). In the same as (iii) if the price found payable is very little in decrease of the sum claimed by defendant and much in excess of what was offered by the plaintiff, the same rule should be followed.

(v). Where the plaintiff has claimed to pre-empt for a sum considerably below the sum found to be due ultimately, and such sum found due is also considerably below the price claimed by the defendant, plaintiff should be awarded some portion only of his costs.

See P. R. 113 of 1906.

Plaintiff claimed to pre-empt on Rs. 3,100, and Rs. 5,100 were fixed as the price payable. The Chief Court allowed him only half costs.

(vi). If the sum found payable is only in slight excess of what plaintiff has offered to pay, and considerably less than what defendant's claim, plaintiff should ordinarily get full costs.

XV.—PAYMENT OF PURCHASE-MONEY.

We have to consider here various points relating to the payment of and disposal of the purchase-money.

A. Method of payment :—

1. Tender of the price in Court even when not accepted is equivalent to payment.

(i). P. R. 31 of 1880.

Where the decree-holder in a pre-emption suit tendered payment to the Court executing the decree of the pre-emption money decreed by the Appellate Court within the period fixed by the said Court, and the executing Court, being ignorant of the terms of the Appellate Court's decree, declined to accept payment, held, that under the circumstances, the defendant was not entitled to have the decree for pre-emption declared void.

(ii). P. R. 69 of 1881.

Where the holder of a decree for pre-emption tendered the purchase-money at the proper Court within the time fixed, but the Naib Nazir refused to receive it in the absence of the Tahsildar, whose absence was unexpected and could not have been foreseen by the plaintiff, held, the decree did not therefore become void, as the decree-holder complied with the terms of the decree when he tendered the money in the time fixed.

(iii). P. R. 79 of 1881.

Where the decree-holder in a pre-emption suit offered the amount mentioned in the decree after the date fixed for payment, but alleged that he had already tendered the said amount within the period fixed, and been directed to take it back and pay it when an appeal, which was to decide to whom the money should be paid, had been decided, held, that if the plaintiff did offer the amount as stated, he had in effect paid the amount into Court before the day fixed with- in the meaning of section 18, Act IV of 1877.

2. Tender with request to keep in deposit is payment.

VI N.W.R.H.C.R. 46.

Where the decree-holder tenders the purchase-money to the Court in the time fixed with a request that it be kept in deposit until mutation is effected, such tender suffices.

3. The tender or payment must be to Court.

(i). P. R. 31 of 1877.

Where a tender was made to the Nazir at his house, held, the refusal to receive it was correct.

Campbell, J.:—Dissenting.

(ii). P. R. 98 of 1880.

The money must be paid into Court under section 214, C. C. P., and a tender to the defendant is insufficient.

(iii). Order XX, rule 14 (1), C. C. P.

(iv). P. W. R. 140 of 1910.

A tender after Court hours to the Nazir at his house is not tender.

4. Payment of purchase-money includes:—

(a). Payment of foreign circle notes.

P. B. 67 of 1892.

A successful plaintiff paid part of the deposit in foreign circle currency notes. The Court at first accepted the notes in payment without objection, and afterwards allowed two more days to supply notes of the Lahore circle or other legal tender, which order was complied with.

Held, Currency notes are money in the ordinary acceptation of the term, though they may be notes of a different circle.

The words "purchase money" are not defined, and there is nothing in section 17, Punjab Laws Act, or section 214, C. C. P., to put a restricted or technical meaning on them.

The order in question was held to be one under section 244, C. C. P., and therefore appealable.

(b). Filing of receipt in part.

P. R. 21 of 1889.

A. got a decree against two vendees, B. and C. By the date fixed for payment A. filed two-thirds to pay to B. and gave C.'s receipt for the remaining one-third which was admitted by C.

Held, this last payment was a payment into Court under section 18, Punjab Laws Act,

But not the deposit of Government Promissory Notes.

P. R. 70 of 1890 F. B.

The payment into Court of 4 per cent. Government promissory notes to the value of the price payable is not a payment of money.

5. If the plaintiff is burdened with costs, he must pay the costs in the time fixed along with the principal purchase-money.

(i). Order XX, rule 14 (1), C. C. P.

(ii). P. R. 96 of 1884.

A pre-emptor who has obtained a decree for pre-emption on condition that he pays the purchase-money and costs by a certain date, loses his decree if he fails to pay the costs, though he has paid the actual purchase-money within the stipulated time.

6. If the plaintiff is directed also to pay the defendant compensation for improvements, and pays the purchase-money and costs in the stipulated time, but does not pay the compensation awarded, he does not thereby lose the benefit of his decree.

P. R. 91 of 1892.

The payment of the pre-emption money within the fixed time would save the decree from forfeiture, even though the compensation be not paid.

7. Where the plaintiff has been awarded costs he is entitled to deduct the amount of costs awarded him from the purchase-money at the time of payment, and where the costs are partial he is entitled to deduct the difference between the costs awarded him and those awarded to the defendant.

(i). P. R. 70 of 1888.

The decree was for pre-emption on payment of Rs. 1,000 in two months from the date of decree, plaintiff to get Rs. 17-4-0 costs. The *parcha* given to plaintiff distinctly said he must pay Rs. 982-12-0 in the specified time.

Held, that the payment of Rs. 982-12-0 in the prescribed time was a compliance with the decree, and even if the *parcha* had not mentioned the sum of Rs. 982-12-0, still plaintiff would have been entitled to deduct his costs.

(ii). P. R. 78 of 1896.

A. obtained a decree conditional on the payment of Rs. 170 and was awarded costs of Rs. 62-2-0 on 11th December 1886. He paid in Rs. 170 on 3rd January 1887, but a third person attached and realized Rs. 103-9-0 thereof in execution of a decree. The decree was set aside in the Divisional Court, but eventually restored by the Chief Court with costs throughout (Rs. 134-2-0). Nothing further was paid in.

Held, he was entitled to deduct the costs, and as to the balance of Rs. 35-14-0 they were more than covered by the costs (Rs. 82-6-6) realised by the defendants before the Chief Court's order and which they had to refund, and consequently that the order of payment had been complied with.

(iii). VI All. 351.

A successful pre-emptor in depositing the purchase-money directed under the decree is entitled to deduct therefrom, before deposit, the amount of costs awarded him, and his filing the price, less costs, does not render his decree void under section 214, C. C. P.

(iv). XIX All. 256.

If a decree for pre-emption be given with partial costs in favour of plaintiff and partial costs for defendant, the plaintiff is entitled to set off his costs against the defendants.

(v). XXVIII All. 676.

A judgment, dated 24th September 1904, in favour of the pre-emptors under a foreclosure decree directed payment in two months of Rs. 2,100, together with the costs, if any, incurred by the purchaser in obtaining the order absolute. The corresponding decree contained the words "together with costs of the purchaser in the foreclosure case, if any." The decree also awarded plaintiffs Rs. 117-4-0 as costs,

The Rs. 2,100 was paid in the time fixed. On 24th February 1905 judgment-debtors claimed they were entitled to be restored to possession, and that the suit must be deemed to have been dismissed, inasmuch as the costs of Rs. 25-12-0 had not been deposited.

Held, that the Rs. 117-4-0 could be set off against the Rs. 25-12-0 and that the Rs. 2,100 deposited was therefore in excess of the actual sum payable under the decree and judgment-debtors' claim failed.

(vi). XXXIV All. 596.

A successful plaintiff-pre-emptor deposited in Court the amount of the decree in his favour, but later withdrew the costs decreed in his favour out of such sum. The Appellate Court enhanced the price payable, and he paid in the difference. Held, the decree had been sufficiently complied with.

(vii) 8. A. L. J. Notes, p. 87, ditto.

NOTE :—

The question as to the deduction of costs from the purchase-money is a question relating to the execution of the decree.

P. R. 32 of 1879.

Plaintiff sued to recover land of which possession was given to defendant in execution of a decree for pre-emption. In that suit the decree-holder (now defendant) paid into Court Rs. 124-3-3, and took credit for Rs. 50-12-9, costs payable by the then judgment-debtor, in accordance with an order of the Court executing the decree, which directed possession to be given on payment of the amount above mentioned.

Plaintiff claimed to recover possession on the ground that the decree became void on 14th July 1875, because the decree-holder had not paid in Rs. 175 in cash, and that the execution Court could not allow the decree-holder to pay less than that sum, or to pay any portion of it after July 14th.

Held, that the question raised being identical with that which occurred in the course of the former suit, it was a question arising between the parties to the suit, in which the decree was passed and relating to the execution of the decree, which, by section 11, Act XXIII of 1861, was a question to be determined by the Court executing the decree, and not by separate suit and therefore that the second suit was barred.

8. Where the pre-emptor in depositing deducts costs, and on appeal the price is enhanced and the order as to costs set aside, if the pre-emptor makes good the deficiency between the original and enhanced price, without refunding the costs, he will be held to have made payment in full,

(i). X All. 400.

A Court of first instance decreed a claim for pre-emption conditional on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. In the specified period the pre-emptor paid into Court Rs. 195, and subsequently executed for costs by drawing out Rs. 39-9-0.

On appeal the price was raised to Rs. 200, and the order as to costs reversed. In the period specified in the Appellate Court's decree the pre-emptor paid in a further Rs. 75. Then the vendee applied, under section 383, C.O.P., for restoration of the property on the ground that the full Rs. 200 had not been paid in time.

Held by Straight and Mahmud, J.J., that the payment of Rs. 125 could not be said to have been reduced by the execution for costs, and the subsequent payment of Rs. 75 satisfied the requirements of the Court's decree, subject to the judgment-debtor's right to recover the costs realized by the pre-emptor.

Held by Tyrell, J., that, though the pre-emptor had once made a payment in compliance with the first Court's decree, the compliance became immaterial on the modification of the decree on appeal, and, as he had never had a credit of Rs. 200 in any Court, as required by the Appellate Court's decree, he had failed to fulfil the condition essential to pre-emption.

(ii). P. R. 56 of 1910.

Where, in a suit for pre-emption, the first Court passed a decree for possession of certain property on payment of Rs. 430 authorising the pre-emptor to deduct Rs. 5-14-0 as costs, and it was so paid by the pre-emptor within the time fixed by the Court, but on appeal by the vendee the price was raised to Rs. 512 reversing the order as to costs, but no notice of the exact additional amount payable was given to the pre-emptor, who paid in Rs. 82, the difference between Rs. 430 and Rs. 512, whereupon the vendee contended that the order of the Appellate Court had not been complied with.

Held, that the payment of the difference within the time allowed without the costs already realized was a sufficient compliance with the decree of the Appellate Courts, and the vendee was separately entitled to recover costs.

B.—Time for payment.

1. The Court granting the decree must fix a specified day on or before which the pre-emption money and costs must be paid. It should not fix a period within which payment is to be made.

(i). Order XX, Rule 14 (1), C. C. P.

(ii). P. R. 48 of 1906.

It is the correct course under section 214, C. C. P., to name a day for payment.

2. In computing the time within which payment is to be made, if the last day is a holiday, it is excluded.

(i). P. R. 31 of 1877.

If the last day for payment under a pre-emption decree is a holiday payment on the next day is in time under section 18, Punjab Laws Act.

(ii). III All. 850.

A decree, dated 12th December 1879, directed payment in thirty days or, in default, the suit would stand dismissed. The date expired on a Sunday, and plaintiff paid in next day.

Held, the last day being a Sunday should not be taken into account in computing the period, and that the plaintiff had complied with the conditions imposed on him by the decree.

3. In computing the period the date of the decree should be excluded.

(This is of no importance now, if Courts will only observe the rule that a date should be fixed, and not a period, but it frequently happens Courts omit to notice the rule).

III All. 850.

The day on which the decree is passed should not be taken into account in computing the period specified in the decree for the payment of the purchase-money.

4. The day expires at sunset.

P. R. 31 of 1877.

P. R. 1 of 1879. Under section 18, Act IV of 1872.

5. The date fixed for payment cannot be extended—

(a).—By agreement between parties.

P. R. 98 of 1880.

In a suit for pre-emption plaintiff obtained a decree which provided that the pre-emption money must be paid within three months. As an appeal from the first Court's order was pending, plaintiff did not lodge the amount within the prescribed period, but waited till after the decision of the appeal, when defendant refused to receive it. Plaintiff pleaded a mutual agreement between the parties to defer payment till after the decision of the appeal.

Held, that no such tender or agreement would suffice to extend the period in variation of the terms of the decree, and that therefore plaintiff's right had lapsed.

(b).—By the Court passing the decree or executing Court.

(i). P. R. 1 of 1879.

Where the purchase-money is not paid in before sunset of the day specified in the decree, the decree becomes void, and there is no power in the Court to receive the money after the specified date, even on good cause being shown for default in punctual payment.

(ii). P. R. 98 of 1880.

An extension of the time by ten days by the Court, even for sufficient reasons, is illegal.

(iii). P. R. 67 of 1892.

The time cannot be extended by the first Court.

(iv). P. R. 53 of 1903.

It is not in the power of the first Court to extend the time for payment.

(v). P. W. R. 140 of 1910.

(c). By the Appellate Court on application before hearing the appeal.

(i). P. R. 137 of 1894.

A Court gave a decree for pre-emption conditional on payment by a certain date. The decree-holder appealed and his application for extension of time, while the appeal was pending, was granted by the Appellate Court.

Held, the Appellate Court had no authority to extend the date for payment before its own decree was made.

(ii). P. W. R. 140 of 1910.

(d). By the mere fact that either party has appealed.

(i). C. A. 479 of 1900.

A plaintiff-pre-emptor cannot simply by appealing extend indefinitely the time for payment of the purchase-money.

(ii). XVIII All. 223.

If defendant-vendee appeals it does not extend the period for payment. We fail to see what relief he could be entitled to if the pre-emption price had not been paid in the time fixed, as the only operative decree at the time of hearing would be a decree in his favour.

It would be, in our opinion, frustrating the intention of the Legislature in section 214, if we were to hold that a plaintiff, merely by appealing from a decree in pre-emption, could extend the time to an uncertain and unspecified day.

6.—(a). Generally speaking, the Appellate Court may extend the time for payment in its own decree.

(i). N. W. P. Rep. 1868, p. 254, F. B.

An Appellate Court, in its discretion, may vary the decree of the first Court in the matter of payment, even though the time had expired before the appeal was filed.

(ii). II All. 744.

The first Court directed payment of the purchase-money in one month from the date of the decree. Plaintiff appealed against the price and, during pendency of appeal, the time fixed expired without the deposit being made. The Appellate Court dismissed the appeal, but extended the time for deposit.

Held, the Appellate Court was competent to extend the time for making the deposit and its action and order did not contravene section 214, C. C. P.

(iii). XVIII All. 223.

The Appellate Court, if it sees fit so to do, may extend the time within which the pre-emptive price, if any, is to be paid, and fix a day itself.

(iv). P. R. 53 of 1903.

Possibly the time for payment might be extended by the Appellate Court.

(b). It is, however, in dismissing an appeal by either party not bound to extend the time.

(i). N. W. P. H. C. R. 1868, p. 254, F. B.

Where the pre-emptor appeals in regard to the price fixed and fails thereon, and has deposited no money within the fixed time, and the Judge declines to enlarge the time, held, the Lower Appellate Court is not bound in its decree to insert any special direction concerning such deposit unless occasion called for it, although it was important to have done so.

(ii). I All. 132.

Quotes and follows N. W. P. H. C. R. 1868, p. 254.

(iii). P. R. 48 of 1906 F. B.

An Appellate Court, when deciding an appeal by a purchaser from a decree for pre-emption and dismissing the same, is not bound to fix a period subsequent to the date of its decree within which the price fixed by the first Court is to be paid.

(c). There is a conflict of opinion as to whether it can extend the time, when the time fixed by the Lower Court has already expired.

Rulings to effect it can do so.

(i). N. W. P. H. C. R. 1868, p. 254.

(ii). II All. 744.

Contra :—

P. R. 137 of 1894.

The Appellate Court in its decree extended the time for payment by two months. Held, that the terms of the original decree can only be altered by the decree of a competent Court setting it aside, and, under the decree of the first Court, payment in a certain time was a condition which had to be fulfilled in order to keep the decree in force, and as such condition was not complied with, there was no decree in existence when the decree of the Appellate Court was made. As before that decree was made the time under the first Court's order had expired, there was no decree in existence.

NOTE.—This judgment is expressed, in any case, in far too wide terms, as there is an unanimity of judgments that, under all circumstances, the Court of Appeal may and should extend the time, except where the decree is upheld, when it has the option of doing so. Moreover, the view appears to me to be incorrect, because sections 17 and 18, Punjab Laws Act, are not applicable to Appellate Courts.

See P. R. 70 of 1890, F. B., 161 of 1890, and 10 of 1895.

(d). Where it accepts the pre-emptor's appeal or raises or reduces the amount of the purchase-money, the Appellate Court can extend the time.

(i). P. R. 70 of 1890 F. B.

A got a pre-emption decree conditional on payment of Rs. 500 by a specified date. The money was paid in. Defendant appealed as to price only, and the sum was raised to Rs. 1,000, and an order was passed that, if such sum,

plus additional Court-fees, were not paid in in two months, the suit would stand dismissed.

Held, an Appellate Court can frame a pre-emption decree fixing the date for payment where it reverses the finding of the first Court or where it raises the amount payable or alters the time in which payable.

(ii). C. A. 397 of 1903.

A plaintiff-pre-emptor, who has not paid any part of the pre-emptive price decreed, is entitled to further time for payment subsequent to the Appellate decree reducing the price.

7. Should, however, the Appellate Court decline to extend the time, the question arises as to what is the date from which the time is to be computed.

If Courts follow the directions of Order XX, C. C. P., and fix a definite date for payment no difficulty arises, as the date is a fixed and determinable point. But frequently decrees give either a period without stating from when the same is to be computed, or a period from the day the decree becomes final.

Though the rulings, therefore, are largely now of academical interest, it is advisable to note them.

The points to note are :—

(a). A decree becomes final only when the period of limitation for preferring an appeal has expired, or, if such period expires on a holiday, on the day the Court re-opens.

V All. 107, VII All. 107.

(b). If an appeal is lodged the decree becomes final when the appeal is decided, but, if the appeal is withdrawn, the decree appealed against is final from the date on which it was decided.

I All. 132, I All. 293, III All. 135.

(c). Where the first Court's decree simply fixes a period without mentioning from when the period is to be computed, or fixes a date, the period must be computed from the date of the first Court's decree.

P. R. 67 of 1895, P. R. 48 of 1906 F. B., XVIII All. 223 III, All. 850.

Contra :—

P. R. 10 of 1895, P. R. 88 of 1898, XI All. 346.

8. If the decree of the first Court is not affirmed, and no period or date is fixed for depositing the pre-emption-money, the pre-emptor may execute his decree in the period fixed by the Limitation Act.

P. R. 10 of 1895.

No time having been fixed for deposit, the pre-emptor was entitled to enforce his decree within the period prescribed for execution of decrees by the Limitation Act, and the failure of the Court to comply with the provisions of section 214, C. C. P., did not affect the validity of the decree.

9. The question, whether the deposit was paid in in time, is one relating to the discharge of the decree under section 244, C. C. P.

P. R. 38 of 1898,

On 19th May 1897 A got a pre-emption decree against S. for Rs. 2,000, the money to be paid on 28th June 1897, plus Rs. 29 for costs of conveyance. A paid in only Rs. 2,000 by 28th June 1897, S applied that the decree was void, because the Rs. 29 was not paid. The Court dismissed the objection and S appealed to the Divisional Court, which held no appeal lay.

Held the question, whether the purchase-money had been deposited in time, fell under section 244, C. C. P., and an appeal lay.

IV All. 420 expressly dissented from.

Contra :—

IV All. 420.

The question, whether a plaintiff has paid in the purchase-money into Court in the time fixed, is not one relating to the execution of a decree within the meaning of section 244, C. C. P., but is which should be decided in the suit itself, in respect of which pleas in appeal could be urged.

C.—Effect of non-Payment.

1. The effect of non-payment of the purchase-money on due date is that the pre-emptor's claim becomes dismissed with costs in accordance with the terms of the decree (Order XX, Rule 14). If the decree is silent as to the effect, the decree on default becomes incapable of execution.

(a). This rule must be interpreted strictly :—

(i). P. R. 37 of 1874.

The pre-emption law must be construed strictly, and where a decree, dated 11th July, directed the money to be paid within three months, the money not being paid before 10th October, the plaintiff lost his right of pre-emption.

(ii). P. R. 47 of 1898.

Where a decree in a pre-emption suit ordered the pre-emption money to be paid by a certain date, but omitted to state that the case would stand dismissed if not, held, that such omission did not extend the time in which the plaintiff could pay the money, the plaintiff being bound, nevertheless, to pay the amount into Court in the time fixed.

In such a case, when the plaintiff failed to pay the amount into Court within time, held the decree had become one incapable of execution and was not governed by section 179, Limitation Act, which only applies to decrees capable of execution.

(iii). C. A. 1242 of 1899.

When a decree for pre-emption on payment of a certain sum of money is passed in favour of several persons and some only of them provided all the money, it lies upon the others to show that they have not given up their rights under the decree, and that they are entitled to claim their share of the bargain from those who provided the whole money.

(v). P. R. 53 of 1903.

A pre-emption decree becomes void and inoperative if the pre-emptive price is not paid within the time prescribed for its payment in the decree. An omission in the decree of any order as to what would be the consequence of the decree-holder's default in payment of the pre-emptive money does not in any way affect the case.

(v). S. D. A. N. W. P. 1864, Vol. II, 612, S. D. A. L. P. Summary Cases 36.

Failure to pay in the time fixed involves forfeiture of the decree.

(vi). I All. 293.

Where plaintiff in a pre-emption suit got a decree, subject to payment of the purchase-money in the fixed period, and failed to comply with the condition imposed on him by the decree, held, he had lost the benefit of the same. Failing the fulfilment of the condition the decree became null and void and incapable of execution.

(v). XIV All. 529.

Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price in one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment in the prescribed period, held that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption.

(b). If however, there is an appeal, and after its decision there is no unreasonable delay and the delay is capable of explanation, the pre-emptor should not be deprived of his decree.

P. R. 79 of 1881.

Where the ultimate payment was not made promptly after appeal had been decided, held the right was not lost where the delay of three months was not unreasonable and was capable of explanation, *viz.*, the pre-emptor was not a party to the appeal.

(c). But where the first Appellate Court enhances the price, and the pre-emptor does not pay such enhanced price in the time fixed, and on further appeal such price is maintained, he loses the benefit of his decree.

P. R. 101 of 1883.

In the case the plaintiff, as owner of the site, sued to pre-empt a building thereon, and claimed to be put in possession of both site and building. The first Court found he was entitled to pre-empt for Rs. 142, the value of the *amla*, and the first Appellate Court fixed the price at Rs. 413, which included the value of the *amladar's* rights in the site.

Plaintiff paid in Rs. 142 and appealed to the 2nd Appellate Court, which held the right was lost through failure to deposit the difference.

The Chief Court held that, though by not paying the amount fixed by the 1st Appellate Court, the plaintiff had lost his right to pre-empt for Rs. 413, in case the 2nd Appellate Court found he must pay that sum for the site and building, he did not lose his right to pre-empt the building. The Court should decide, as a matter of law, whether he owed anything for the site, and was or was not entitled to pre-empt for Rs. 142.

2. The decree cannot be executed until the purchase-money is paid.

XXIV All. 300.

In the case of a decree for pre-emption there is no decree capable of execution until the decree-holder pays into Court the pre-emption price.

3. Non-payment of the sum fixed by the first Court in the time fixed will, however, not bar an appeal as to price, period allowed, or decision on the conditions of the contract out of which the right is claimed.

Of course, by not paying, the pre-emptor takes the risk of finding his decree useless if the Appellate Court decides against him and declines to extend the time, but his mere failure to pay the purchase-money will not deprive him of his right of appeal.

(i). C. A. 1383 of 1887.

(ii). P. R. 70 of 1890 F. B.

Non-compliance with a decree in the matter of payment of deposit in a fixed time is not fatal to an appeal as to the price.

(iii). P. R. 67 of 1895.

On 26th January 1893 A filed a suit for pre-emption, and on 7th February 1893 B, a brother of A, sued also, making A a defendant.

On 24th April 1893 both suits were decided. In B's case a decree was given in favour of B and A in equal shares, contingent on Rs. 3,000 being filed by June 1st.

In A's case a decree for the whole land was passed on the same contingency, each decree being declared subject to the decree in the other suit. In A's case alone was any term of voiding on failure to pay inserted.

B did not pay in. A filed Rs. 1,500 on 24th May, and on 23rd June 1893 appealed in his own case *re* price.

The Divisional Court rejected the appeal on the ground that the whole Rs. 3,000 had not been paid in.

Held:—The appeal should have been entertained and disposed of on its merits. The intention of both section 214, C. C. P., and section 18, Punjab Laws Act, is not to hamper or preclude the right of appeal, but to provide a penalty for disobedience to the terms of decree as to deposit, only if it is accepted by parties as correct or declared to be so after appeal to a higher authority, and it was not intended to lay down a rule under which the plaintiff appellant might, in a just claim, be precluded from a hearing in the Appellate Court, merely because poverty or other causes prevented him raising even temporarily a sum largely in excess of the true market-value.

(iv). P. R. 92 of 1900.

Non-payment of the pre-emption-money in the time prescribed does not bar an appeal.

(v). XIII All. 189 and XIII All. 376.

(Same case reported twice).

The plaintiff in a pre-emption suit obtained a decree in his favour for pre-emption of the share in suit on payment of a fixed sum within a period specified in the decree, otherwise the suit was to stand dismissed. He did not

comply with the terms of the decree, but, after expiration of the term mentioned therein, appealed against it.

Held, the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff appellant, and the discretion of the Court as regards the period allowed for payment.

(vi). XVI All. 126.

Held, that plaintiffs in a pre-emption suit, who had obtained a decree conditional on payment by them of the pre-emption price within a fixed period, could, after the expiration of such period without payment, appeal against such decree on the ground that a condition of the contract, *viz.*, that the purchase-money was to be paid to the vendor's mortgage creditors, out of which their right to pre-empt arose, had not been embodied in the decree. The failure to pay before appeal under such circumstances does not operate to dismiss the suit.

(vii). XVIII All. 223.

There is no doubt a plaintiff, who has obtained a decree under section 214, can appeal within the period prescribed by the Indian Limitation Act for his appeal, whether or not he has made the payment on or before the day fixed.

Contra :—

C. A. 1444 of 1881, C. A. 303 of 1886.

Failure to pay the price fixed in the stated time bars an appeal.

One ruling holds that failure to pay bars an appeal against a rival pre-emptor's decree, but as, under the present Code, the effect of non-payment is that the suit stands dismissed and not as under the old law the decree becomes null and void, I think the plaintiff having a decree against himself is entitled to appeal against it on any grounds. The ruling is :—

P. R. 161 of 1890.

A successful plaintiff failed to deposit the pre-emption money, and the decree lapsed therefor, but he appealed on the ground that a decree should not have been passed in favour of his rival pre-emptors.

Held, the non-compliance with the decree barred the hearing of the appeal, and caused also the loss of the right to pre-empt.

P. R. 70 of 1890 were appeals against enhanced prices of the first Appellate Court, the prices fixed by the first Court having been paid in.

We can understand a plaintiff might be entitled to appeal from an order dismissing, in default of payment, on any grounds calling in question the dismissal on the grounds on which it was founded, *e. g.*, that the price was excessive or that reasonable time was not given, and in such cases an appeal would lie even without payment as directed, provided section 18 did not bar, but here plaintiff did not object to pay the amount fixed. He was anxious to pay and had plenty of time to do so, but he really has no money and cannot borrow.

4. Failure to pay at the appointed time only affects the decree-holder, and not other claimants.

C. A. 1449 of 1907.

A and B got decrees for pre-emption against C, but failed to pay into Court the pre-emptive money, after which C and A made a compromise, whereby

part of the land went to A. Held A and B's decrees had become dismissed by non-payment, and a claim by another pre-emptor was not barred even as regards the portion which passed to A under the compromise.

5. The rule that non-payment on the appointed date renders forfeiture of the right applies even to a case where by mistake the pre-emptor pays the whole price except an anna.

P. W. R. 3 of 1913.

D.—Disposal of the Pre-emption-money.

1. When the purchase-money is paid into Court, it remains at the disposal of the vendee, and not of the pre-emptor. The pre-emptor is not entitled to withdraw on any pretext.

(i). P. R. 76 of 1902.

The holder of a decree for pre-emption duly deposited the purchase-money, Rs. 1,475, in Court as directed. Subsequently a reversioner of the vendor brought a suit to have it declared that the sale was without necessity and should not be allowed to affect his rights, except in respect of Rs. 300, and obtained a decree.

The pre-emptors then asked the Court for the return of their purchase-money, as they no longer wished to go on with the purchase, as their decree of pre-emption had been superseded by the declaratory decree. The Court, without informing the vendee, ordered the refund of the money, and the vendee appealed to the Divisional Court who declined to interfere on the ground that the procedure for paying money into Court in pre-emption cases was not a procedure in execution of a decree, and that he had no jurisdiction to hear an appeal from such an order.

Held, as the effect of the Munsiff's order was to deprive the vendee of his money, which he was entitled to under a decree of Court, it fell within the scope of section 244 c, C. C. P., and so an appeal lay.

Held also, it is the vendee, and not the pre-emptor, who has the control of the purchase-money, which forms the consideration for his resigning to the pre-emptor his right and title to the property. It would be most anomalous to allow the pre-emptor, after he has obtained a decree and paid in the purchase-money, to change his mind suddenly and take back his money, and the fact that he had made a bad bargain could make no difference to his legal position.

Money paid into Court can never be returned to the pre-emptor without the consent of the vendee.

(ii). P. R. 93 of 1902.

The Court is not competent to pay away the money to any person other than him for whom the money is paid in.

(iii). XIX All. 256.

Money paid in to meet pre-emption can only be withdrawn by the vendee entitled to it under the decree.

2. The money cannot be attached by a creditor of the pre-emptor, or other person, so long as it is in the custody of Court.

(i). P. R. 78 of 1896.

Money deposited to meet a pre-emption decree is not at the pre-emptor's disposal and is unattachable by any creditor of his.

(ii). P. R. 21 of 1902.

Money deposited in Court to be paid to a vendee under a pre-emption decree cannot be withdrawn by an attachment under a decree of a third party, and the Court is not competent to pay it out to anyone but the person entitled to it under the decree for pre-emption.

(iii). C. A. 23 of 1895, All. XIX All. 256.

The decree-holder paid the pre-emptive price into Court. A creditor of the decree-holder applied for attachment of the money so paid in, and ultimately was allowed by the Court to withdraw a portion of it. After the pre-emption decree had been confirmed on appeal, the pre-emptor applied for possession of the pre-empted property.

Held the decree-holder was entitled to obtain possession, and that it was not competent to the Court to pay out to anyone but the person entitled to it under the decree for pre-emption, any portion of the pre-emptive price so long as the decree for pre-emption was not modified or reversed on appeal.

(iv). Section 10, Pre-emption Act.

3. Should, however, the Court allow an attaching creditor to withdraw, the pre-emptor is not bound to make good the amount withdrawn.

(v). P. R. 78 of 1896.

Where money deposited to meet a pre-emption decree has been wrongly withdrawn by an attaching creditor of the pre-emptor, held, that the attached portion has never ceased to be a part of the deposit, and the pre-emptor, on that account, is not bound to redeposit the amount attached.

(vi). P. R. 21 of 1902.

The holder of a decree for pre-emption duly deposited the purchase-money in Court as directed, and obtained possession of the land. Subsequently, the money so paid in having been attached by a creditor of the decree-holder, who took it out of Court, in execution of his own decree, the vendees applied for a return to them of the land, as they had received no purchase-money, and the first court ordered the pre-emptor to deposit a further sum for payment to the vendees.

Pre-emptor appealed to the Divisional Judge, who confirmed the lower Court's order on the authority of P. R. 61 of 1890.

Held, expressly overruling 61 of 1890, that, as the pre-emptor had fulfilled his part of the order, and had duly complied with the decree in depositing the amount decreed, he was entitled to retain possession without payment of any further sum.

Contra :—

P. R. 61 of 1890.

A decree for pre-emption was passed in favour of A against B conditional on paying into Court a certain sum by a certain date. The money was duly deposited as directed, but it was attached and taken out by A's creditors as his money. A applied for delivery of possession, B objected until he was paid.

Held, B's contention was correct, the money deposited having gone to A's benefit, he must, therefore, before getting possession, pay over again.

4. If the vendee withdraws the deposit he is not debarred from appealing.

P. R. 16 of 1907, P. R. 83 of 1912.

A vendee does not forfeit his right to appeal, merely because he has withdrawn from Court the deposit made by the pre-emptor for his benefit.

Contra:—

C. A. 695 of 1905.

After filing a further appeal against a decree for possession of property passed in a pre-emption suit in favour of the pre-emptor, the defendant-vendee applied for stay of execution. The application was granted on condition of his furnishing security for payment of interest, till the decision of appeal, on the amount of the purchase-money deposited by the pre-emptor in Court.

Before decision of the appeal, the vendee withdrew the amount from Court. Held that, by doing so, the vendee lost his right of appeal, as, by so doing, he accepted the right of the plaintiff to pre-empt.

5. If the vendee withdraws the deposit, he must pay interest on the part or the whole, as the case may be, if the sum is reduced or the pre-emption decree set aside on appeal.

(i). P. R. 111 of 1892.

A pre-emptor paid in the sum ordered, and the original vendee withdrew it. On an appeal by the pre-emptor as to price, the price was reduced.

Held, as the vendee, when he withdrew, knew there was an appeal and had enjoyed the money for a long time, there was no reason why he should not pay 6 per cent. interest per annum on the excess amount he had enjoyed.

(ii). XVIII All. 262.

A plaintiff in a pre-emption suit obtained a decree and paid into Court the pre-emptive price as stated in the decree, and the money was drawn out of Court by the vendee. Subsequently the decree was reversed on appeal and the plaintiff then applied, under section 583, C. C. P., for a refund of the money paid into Court as above described and interest.

Held, the pre-emptor was entitled to a refund of the money, together with interest at 6 per cent. per annum up to the date of re-payment.

XVI.—PROCEDURE FOR THE PROTECTION OF THE PROVISIONS OF THE LAND ALIENATION ACT.

1. The pre-emptor must satisfy the Court, under section 23 (a), that the sale is not in contravention of the Land Alienation Act.

2. If he does not, and the Court finds that the sale is in contravention of the Punjab Alienation Act, or that the claimant is not entitled to claim pre-emption, it shall dismiss the suit (section 24).

3. Under section 29, the Court shall send to the Deputy Commissioner a copy of every original decree granting pre-emption, other than a decree granting pre-emption in respect of a building or site of a building in a town or sub-division of a town, and the Deputy Commissioner

may, within 2 months from the date of the receipt of such copy, apply to the Court, to which the appeal in the pre-emption suit would lie, or, if no appeal lies, to the Divisional Court, for revision on the ground that the decision of the Court of first instance is contrary to the provisions of the Punjab Alienation Act, 1900.

No stamps need be paid on such application nor need the Deputy Commissioner appear, and the provisions of the C.C.P., as regards appeal, shall apply to the procedure for disposing of such applications.

CHAPTER X.

WAIVER.

A.—Who is capable of an act of waiver.

B.—Time of waiver.

C.—Nature of waiver.

D.—Acts amounting to waiver :—

(1). Acts held to amount to waiver.

(2). Acts held not to amount to waiver.

CHAPTER X.

WAIVER.

The Pre-emption Act contains no rules of law on the subject of constructive waiver. It deals with statutory waiver under Notice under sections 19 and 20.

In addition, however, to this statutory waiver, the general rule of law has been universally adopted by the Indian Courts that acquiescence in the sale by any positive act, amounting to a relinquishment of the pre-emptive right, operates as a forfeiture of the pre-emptor's right.

This principle has been developed in a series of rulings which have, with considerable differences, stated certain acts which do and certain acts which do not amount to waiver.

Waiver by construction is closely akin to estoppel under the Evidence Act, and any act, which would amount to estoppel, would naturally be equal to waiver, but, in addition to acts of estoppel, waiver includes certain acts of relinquishment, which would not necessarily amount to estoppel.

The principle of waiver is, without doubt, based on Muhammadan jurisprudence, so far as the law of pre-emption is concerned, and the Punjab Courts have applied, with certain exceptions, the Muhammadan Law relating thereto.

The question of waiver divides itself into the following heads:—

- A.—Who is capable of an act of waiver.
- B.—Time of waiver.
- C.—Nature of waiver.
- D.—Acts amounting to waiver.

A.—Who is capable of an act of waiver.

(1). Any person possessed of the pre-emptive right may waive such right.

(No authorities are needed for this self-evident proposition.

(2). A guardian acting *bona fide* in the interests of his ward.

(i). I All. 52, III All. 437, XXIII All. 129.

(ii). P. R. 1 of 1873.

Plaintiff (12 years of age) sued for a right of pre-emption. The land was sold by plaintiff's brother and uncle eight years before suit, plaintiff's mother acquiescing. His father was then dead and had left the mother guardian of plaintiff's person and property.

No right of pre-emption on behalf of the plaintiff was asserted at the time of sale, nor until plaintiff brought this suit.

Held, the silence and conduct of plaintiff's mother, his legal guardian, barred his claim.

(iii). P. R. 37 of 1888.

It was assumed that a compromise entered into by a guardian would, if it amounted to estoppel, in a suit for pre-emption, bind the ward.

Where, however, the guardian had an independent right of pre-emption, any waiver on his part would be referred to his own right, and not to the minor's right.

(i). P. R. 121 of 1889.

A. was entitled to pre-emption by reason of being a neighbour. He was also *de facto* guardian of a minor co-sharer in the land sold. After having taken part in the negotiations for sale, he brought a suit for pre-emption on behalf of the minor. Held, he was entitled to insist it was his own interest he gave up, and to distinguish between his own personal right of pre-emption and that of the minor.

(ii). P. R. 7 of 1912.

Even if plaintiff was a minor at time of sale, the father's assent would not bind the son, there being nothing to show the former acted or professed to act as his *de facto* guardian.

A guardian can give up his own personal right of pre-emption without giving up that of his ward.

(iii). P. W. R. 54 of 1912.

Acquiescence by a guardian does not bar his minor son suing.

(iv). P. L. R. 89 of 1912.

A minor suing to pre-empt land sold by his father, who was also his guardian, is not estopped, as his right is an independent one, and consent of a guardian is not equivalent to acquiescence by the son.

Contra to the general rule :—

P. R. 2 of 1903.

Where a guardian of a minor plaintiff had, at a date between the transfer and institution of the suit, on behalf of his ward, taken a portion of the property sold on a temporary lease from the vendee (such, if done by a competent pre-emptor, being tantamount to waiver), held the ward was not estopped.

See however as regards section 11, Act II of 1905.

P. W. R. 2 of 1913.

Waiver by a father is equal to waiver by the son, as the latter has no independent right of pre-emption under that section.

(3). An agent on behalf of his principal.

(i). I All. 521.

(ii). VII All. 41.

It is a general rule of pre-emption that any act or omission on the part of a duly authorized agent or manager of the pre-emptor has the same effect on pre-emption as if such act or omission had been made by the pre-emptor himself, therefore refusal by an agent to buy is tantamount to refusal by the pre-emptor to buy.

But

(1). A waiver by some co-sharers does not amount to a waiver by all.

P. R. 94 of 1877.

In the right of accepting the offer of sale, which belongs under clause 2, section 14, to the *pattidars*, jointly there is involved a right on the part of every *pattidar* to accept the offer and the joint right thus regarded is not lost or destroyed by the refusal or omission of some of the *pattidars* to join the rest in the acquisition of the land offered.

Quære, however, if the majority positively relinquished the right, ostensibly on behalf of all, would every one be barred?

(2). Failure by a successful pre-emptor to fulfil the conditions of the decree is no bar to the father suing, if he is separately entitled.

P. R. 1 of 1885.

A. brought a pre-emption suit and got a decree, but allowed it to lapse by non-payment of the pre-emption money in the time fixed. A.'s father then sued.

Held, as there was nothing in the first suit to indicate, A. was suing in a representative character, or that he did anything but assert his own individual right, that the first suit was not a bar to a subsequent suit by his father in which he asserted his own individual right.

(3). A waiver by a father does not affect a son with an independent right.

P. R. 7 of 1912.

Under section 12 each heir has an independent right of pre-emption in order of succession, and consequently a son's right, being independent of his father's, is not affected by the father's assent to the sale.

B.—Time of waiver.

Under the Muhammadan Law a pre-emptor, aware of the sale, must make his demand immediately in accordance with certain formalities. Failure to do so involves loss of the right. Consequently it has been held that, as the demand can only be made when the sale is completed, there can be no waiver until the sale is complete.

Under the Punjab Law immediate demand is not necessary, nor are any formalities required to be observed before suit, and consequently the waiver can be made at any time while the sale is under contemplation.

The rulings based on Muhammadan Law, which are of purely academical interest in the Punjab, are:—

I All. 521, VII All. 478, VII All. 775, XVI All. 247, XXVII All. 670, and S. A. (Alld) 909 of 1901.

The law in the Punjab is set forth in—

P. R. 90 of 1909 F. B.

Shahdin, J. :—

Under the Muhammadan Law a right of pre-emption cannot be abandoned or waived unless an agreement to sell has already been entered into, for, under that system of law, the offer of purchase has to be made to the pre-emptor after the contract has been concluded, and there can be no waiver of an offer until an offer is actually made. Under the Punjab Pre-emption Act, on the other hand, the right of pre-emption can be waived before a contract of sale is entered into.

It should, however, be noted that acquiescence at a prior sale will not amount to acquiescence in the sale regarding which pre-emption is sought, such second sale not being a transfer in recognition of a pre-emptive right.

(i). II All. 164.

Acquiescence in a mortgage by way of conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute.

(ii) VII All. 478.

In this case two joint owners executed a joint deed of conditional sale in favour of R. and A. each for one-half share. R. foreclosed in respect to his share, and the sale was made absolute and he got possession. Then A. foreclosed and got possession. R. sued to pre-empt regarding A.'s share when it became absolute, and it was urged that, by his accepting a conditional sale coincident with A.'s, he had acquiesced in the transfer to A.

Held, that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage, and that the alleged acquiescence of the plaintiff or pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence, and that consequently the claim was not barred.

(iii). P. R. 23 of 1882.

The fact that the plaintiff knew of the sale to the first vendee will not defeat his claim to pre-empt a second sale by such vendee to a third party; it must be shown his conduct was such as to constitute an estoppel between him and the defendant.

(iv). P. R. 100 of 1885.

A waiver at one sale will not amount to waiver at a later sale.

C.—Nature of waiver.

(1). Waiver cannot be conditional, it must be absolute.

(i). P. R. 42 of 1878.

A person who has a right to pre-empt cannot waive his right conditionally. He cannot say "I waive it in favour of A., and reserve it against all others. He must accept or refuse absolutely."

(ii). P. R. 87 of 1896.

When a sale has actually taken place, a person entitled to pre-emption must decide once for all whether he will enforce his right. He cannot say, "I will forego it as long as the land remains with the first vendee, but, should it pass to or be claimed by anyone else, I will revive and enforce my right."

(2). Waiver in regard to part is tantamount to waiver in regard to the whole, and *vice versa*.

(i). P. R. 106 of 1880.

Having once waived his right with regard to the bargain as a whole, the pre-emptor cannot afterwards re-assert it with regard to a part.

(ii). XI All. 108.

Where a pre-emptor is disentitled by his laches to maintain a suit with respect to a part of the property sold, he is prevented from maintaining his suit for any portion of the property sold, even in a case where he is ready to pay the price of the whole bargain for such portion as he is still entitled to maintain a claim for.

(iii). XXI All. 119.

A pre-emptor who, by his own acts or omission, is disentitled from claiming a part of the property sold, is not entitled to pre-emption in respect of any portion of the property covered by the same deed.

(3). Once the right has been waived, it cannot be re-asserted. The rule applies to cases of retransfer in recognition of a pre-emptive right.

(i). P. R. 106 of 1880.

(ii). P. R. 42 of 1878.

A pre-emptor who has once waived his right cannot afterwards come forward and re-assert his right against another person who has claimed pre-emption in the same sale and obtained a decree transferring the property to himself.

(iii). P. R. 8 of 1882.

Where a pre-emptor has waived his right against the first vendee, he cannot assert it against a vendee by suit from the first vendee.

(iv). P. R. 25 of 1303.

Having once waived the right in respect to a bargain, the person waiving is estopped from asserting the right against subsequent pre-emptors whose claim is superior to the vendor's.

(4). Waiver must be conscious, and not due to misapprehension.

I All. 521.

A claim relinquished upon misinformation of the amount of the sale consideration or the property sold may be resumed when the real facts become apparent.

(5). There must be a positive act amounting to waiver, mere willingness to acquiesce is insufficient.

P. R. 80 of 1881.

Mere willingness to acquiesce in a sale, unaccompanied by any waiver or any conduct amounting to estoppel, does not bar a claim to pre-emption. In a pre-emption suit, where there were two sets of plaintiffs, claiming the right of pre-emption, it appeared that both sets of plaintiffs were aware of the sale, and that one set of plaintiffs would probably not have come forward to claim pre-emption had not the other set first done so, but they brought their suit immediately after the other suit had been instituted.

Held, under such circumstances there could not be said to be any estoppel between the two sets of plaintiffs, and there being no proof of waiver or estoppel such as would bar the suit of the set claiming last against the purchaser, facts which merely tended to show acquiescence in the sale could not be considered.

Contra :—

(i). I All. 521.

Any indication of acquiescence in the sale would vitiate a claim after the sale on the part of the pre-emptive claimant.

(ii). V All. 180.

Acquiescence by the pre-emptor in the sale of which he complains, extinguishes the right of pre-emption, involving the defeasance of the pre-emptor's claim.

D.—Acts amounting to waiver.

(1). The following acts have been held to amount to waiver :—

(a). Relinquishment in express terms.

I All. 521.

The right of pre-emption is void if the pre-emptor relinquishes the purchase in plain terms.

(b). Compromise *re* the land in a previous suit.

P. R. 37 of 1888.

A compromise of a former suit relating to the same property would, if admissible in evidence, be sufficient to prove a voluntary waiver in a subsequent suit.

(c). Taking any benefit from the vendee, or entering into any agreement or compromise with him.

VIII All. 275.

Under Muhammadan Law if a pre-emptor enters into a compromise with a vendee or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right.

In the suit to enforce the right to pre-empt, it appeared that the purchasers, by an agreement made with the plaintiff on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves.

Held, that, by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption and were precluded from enforcing it.

(d). Accepting a derivative title in respect to a portion from the vendee.

(i). P. R. 106 of 1880.

If a person suffers another person to purchase, and is content to accept a derivative title from him in respect to a portion only of the premises sold, being unwilling to buy the rest, he must be held to abide the consequence of losing even that portion, if another person, having a superior title to that of his vendor, claims to assert his right to take over the original bargain as a whole, and the sub-purchaser is estopped from asserting the right he once waived of acquiring the property sold against another person, whose claim to pre-emption, though inferior to his own, is still superior to that of the first vendee.

(ii). P. R. 34 of 1903.

Where a pre-emptor with superior rights agreed with a vendee, who was a stranger, that in consideration of his receiving a portion of the property sold he would waive his objections *re* the sale, held it was not permissible by law so as to defeat the rights of other pre-emptors.

(e). Taking the property sold on mortgage from the vendee without reservation of the pre-emptive right.

P. R. 22 of 1881.

In a pre-emption suit, it appeared that defendant-vendee had mortgaged the property to plaintiff claiming pre-emption for the very purpose of paying the purchase-money to the vendor.

Held, under these circumstances, that plaintiff was *prima facie* estopped from demanding pre-emption as, in the absence of any reservation of his own right of pre-emption at the time of the acceptance of the mortgage deed, he must be held to have waived it.

The *prima facie* estoppel is, however, rebuttable by proof that the plaintiff, at the time of the mortgage, gave notice to the vendee that he reserved his right to claim pre-emption of the land mortgaged.

(f). Attestation of the deed of sale as a witness, and taking an active part in registration.

(i). P. R. 8 of 1882.

The act of attesting the deed of sale, if it be done by a pre-emptor with the intention of relinquishing his own claim, may properly be held to be a positive act discharging the vendor from the obligation of giving written notice to the pre-emptor, and waiving the latter's right of pre-emption.

It is a common practice, in places where a customary right of pre-emption is known or believed to exist, to procure the signature of the pre-emptor to the deed of sale to another person, as proof of the pre-emptor's assent.

(ii). P. R. 25 of 1903.

Attesting a deed and taking an active part in its registration amounts to a distinct waiver of the right to pre-empt.

(iii). P. R. 7 of 1912.

That the father assented to the sale is clearly proved by his signing the sale deed.

(g). Taking of a lease from the vendee.

XXVIII All. 237.

Where, in a suit for pre-emption based upon a custom, it was found that the pre-emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, held, that this amounted to such acquiescence in the sale as would bar plaintiff's right of suit.

But see P. R. 2 of 1903 A (2) *supra*.

(h). Actively conducing the vendee to believe in the pre-emptor's consent.

(i). P. R. 48 of 1912.

Where two plaintiff-pre-emptors were found to have been present and helped in the sale negotiations and one of them assisted in demarcating the land sold out of a large field, and thus by their conduct actively induced in the vendee's mind the belief that they were perfectly agreeable to the purchase by the vendees and did not intend to enforce their rights, held, the conduct of the plaintiffs amounted to waiver.

(ii). C. R. 674 of 1909.

Plaintiff took an active part in the negotiations for sale, appeared at mutation without objecting, and sued at the last moment—held waiver.

(i). Requesting the vendee to buy the property so as to prevent the owners thereof suing the plaintiff to pre-empt other land bought by the plaintiff.

C. A. 1042 of 1908.

A pre-emptor is not entitled to claim property by right of pre-emption where the vendee has purchased the same at the pre-emptor's request.

(j). Taking an active part in sale, being present at mutation, and suing at the last moment.

C. A. 674 of 1909.

The pre-emptor had taken an active part in the negotiations, sued one week only before expiry of limitation, and was present without objecting at mutation. Held, he must be deemed to have waived his right.

(2). The following acts have been held not to amount to waiver.

(a). Refusal to purchase on the ground that the price demanded is not the proper price, even where such price is afterwards found to be the proper price.

(i). I All. 521.

The right of pre-emption may be claimed after a sale notwithstanding there has been a refusal to purchase before a sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property.

(ii). N.W.P. S. D. A. 1861, Vol. I, p. 892 ; III All. 236.

A person having a right of pre-emption does not lose it by refusing to purchase it at the price at which it is offered to him, because he believes such price is in excess of the real price, where such belief is entertained and expressed in good faith,—even where the Courts find the real price is that which the pre-emptor objected to pay.

(iii). III All. 610.

The lower Court finds that there was no such refusal on the pre-emptor's part as would incapacitate him from asserting his legitimate right in Court as he has done, and this finding is a proper one with reference to the determination of the first Court on the issue, which was that the plaintiff was willing to purchase, paying down the principal of the mortgage with interest, but declining to pay compound interest, which was afterwards held payable by the pre-emptor.

(iv). XXXIII All. 637.

A person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith.

(v). All. W. N. 1882, p. 46, and All. W. N. 1882, p. 136.

Contra :—

P. R. 38 of 1875.

If a person willing to pre-empt refuses to buy at a price named, he does so at his own risk, and in suing for pre-emption he must show that the offer was not made in good faith, that is either that the land was offered to him at one price and sold at another and a lower price, or that the land, though sold at the same price asked from him was sold at a fictitious price not representing the true value of the land. He cannot upset a sale if it has been offered to him, and he has refused to purchase at the price ultimately fixed.

(b). Offer to purchase at a lower price than that at which it is sold.

(i). P. R. 68 of 1879.

The mere offer by the pre-emptor of a less sum to the vendor than the property afterwards actually realizes does not alone constitute waiver or relinquishment.

(ii). XVI All. 247.

Where a pre-emptor is willing to purchase and offers a smaller sum than the actual price in the belief that such sum is the real amount of consideration for the sale, he does not thereby lose his right of pre-emption.

(c). Offer to buy at a greatly enhanced figure.

P. R. 19 of 1898.

The mere fact that a pre-emptor, in his eagerness to get the land and outbid others, had professed himself ready to pay a sum above the market value does not amount to an estoppel, when such statement did not lead the defendant to confess judgment or do any other act which he would not have done had the statement not been made.

(d). Offer to purchase at a price not agreed upon.

P. R. 102 of 1894.

An offer to buy at a price not agreed on is not waiver of the right to pre-empt.

(e). Offer to buy from the vendee in order to avoid litigation.

(i). XVI All. 300.

Where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right, and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale-price without resorting to and with the view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption.

(ii). XIX All. 334.

Quotes XVI. All 300 and follows it.

(f). Mere residence with the vendor.

I All. 452.

The circumstance that the claimant lived with the vendors would not deprive her of her right.

(g). Failure to appeal in a prior suit of a similar nature.

P. R. 59 of 1870.

Where in a suit by A against B to pre-empt a share in certain property, in which A got a decree, and B accepted the decree without appealing to a higher Court, the fact of his not appealing does not bar B's right to contest the principles when another share is the subject of dispute.

(h). A previous breach of the pre-emptive right by the claimant.

W. N. 1889, p. 127, XVIII All. 382.

The fact that a claimant for pre-emption has formerly violated the provisions of a *Wajib-ul-arz* relating to pre-emption by mortgaging his share to a stranger would not operate to forfeit his right of pre-emption in respect to a subsequent mortgage.

(i). Preparation of a draft of the sale-deed by an *arzi-navis* entitled to pre-empt.

P. R. 100 of 1885.

In a suit for pre-emption held that plaintiff who was a professional petition-writer could not be held to have waived his right merely because he had made a rough draft of the deed of sale of the property in suit for the defendant.

(j). Omission of predecessor to sue.

Vide Chapter IV, Nature of the Pre-emptive Right.

133 of 1907, XXVIII All. 424, XXXI All. 623 (p. 163-4).

(k). Failure to object to the vendee claiming partition.

VII All. 442.

Subsequent to a sale of a one-third share in a village, the vendee applied for partition. A co-sharer entitled to pre-empt did not object to the application, and partition was effected. He then claimed pre-emption.

Held, there was nothing in his conduct which could amount to estoppel or to waiver.

Contra :—

N.W.P. S. D. A. 1861, p. 506.

Expressly over-ruled in VII All. 442.

(l). Failure to attend at a public auction and outbid the vendee.

(i). P. R. 34 of 1875.

In a case for pre-emption of a house sold in execution of a decree, held, the plaintiff was not precluded from suing by standing by for nearly a year from enforcing his claim.

(ii). P. R. 75 of 1881.

Failure of a person entitled to pre-empt to outbid the purchaser in a sale in execution of a decree does not amount to waiver.

(iii). P. R. 100 of 1885.

We doubt if omission to bid at auction amounts to waiver.

(iv). P. R. 121 of 1888.

Plaintiff having a right of pre-emption does not lose it by failing to bid at a sale in execution of decree.

Contra :—

(i). P. R. 47 of 1873.

A man sued to pre-empt a shop sold by the Official Assignee by public auction. Held, plaintiff's omission to take advantage of attendance at the auction sale, having an opportunity to do so and there asserting his rights as pre-emptor, amounted to a relinquishment of his right of pre-emption.

(ii). P. R. 7 of 1876.

In a sale by auction in execution of decree, if the plaintiff was present on his own behalf or as *mukhtar* for the judgment-debtor whose property was being sold, he is estopped from claiming pre-emption, as the putting up to auction in his presence is an offer of the property.

(m). Acceptance by the pre-emptor, being mortgagee of the property, of his mortgage money from the vendee.

(i). XXXV Cal. 402 Privy Council.

The vendee paid into Court mortgage-money to redeem the mortgage on the land sold. The mortgagees withdrew the same, and then sued to pre-empt. Held, until the decree for pre-emption was made, vendee owned the land and was entitled to redeem. The withdrawal of the money by the pre-emptors was not a recognition of the title of the purchaser, but merely of their right to redeem, and was quite consistent with their right to pre-emption.

(ii). II All. L. J. 145.

Mere acceptance of his money by a mortgagee from the vendee is no waiver of the right of pre-emption.

(iii). P. R. 37 of 1908.

Mere acceptance of his money by a mortgagee from the vendee, or his silence at the time to express a desire to purchase, or his delay in suing, is not waiver of the right to pre-empt.

Contra :—

(i). P. R. 138 of 1888.

In a pre-emption suit it appeared that at the time of the sale one-third of the house sold was under mortgage by one of the vendors to plaintiff, and it was provided in the sale that the vendee should retain some of the purchase-money to pay off the mortgage. Two months after sale, plaintiff gave notice to the vendee to pay him his mortgage-money, threatening an action if he did not do so, and making no mention of his right of pre-emption. The vendee paid off the mortgage and obtained a receipt.

Then plaintiff sued to pre-empt. Held, plaintiff was estopped, he having, without reserving his right of pre-emption, called on the vendee to pay up his mortgage-money and having accepted it from him, had elected to affirm the sale was valid, and it was not open to him, after such election, to treat the sale as voidable.

(ii). C. A. 36 of 1906. (P. W. R., p. 6, of 1906.)

Where the property claimed by plaintiff in pre-emption was mortgaged to him, and he accepted payment of the mortgage-money from the vendee without protest, held, he had waived his right to pre-empt.

(n). Failure to sue promptly.

(i). P. R. 34 of 1875.

Failure to claim promptly if in limitation is not waiver, but held in the particular case (where suit was filed eleven months after sale), the claimant was thereby disentitled to costs.

(ii). P. R. 139 of 1894.

Mere lying by and doing nothing does not amount to waiver.

Contra, under Mohammedan Law.

VII All. 23, *vide* Chapter IX, Procedure Notice (p. 302).

(o). Failure to pre-empt while owner of the pre-emptive tenement.

XX All. 148.

Failure to pre-empt while owner of the pre-emptive tenement is not waiver.

(p). Coincident purchase of other property by the pre-emptor from the same vendor.

(i). VI All. 463.

As regards the point that the *karta* of the joint family, to which the plaintiffs belong, purchased, at the time of the defendant's purchase, a portion of other properties sold by the Court of Wards belonging to the original owner of the property in suit, and so knew of the sale to the defendant, it does not appear to me to place the plaintiffs under any disability to come into Court with their present claim.

(ii). XXIX All. 125.

The fact that a person entitled to pre-empt purchased from the vendor other property at the same time as the property in suit, will not preclude him from asserting his right to pre-empt or defending a suit brought by other pre-emptors subsequent to his repurchase from the first vendees.

(q). Previous contract.

(i). P. R. 58 of 1900.

Where A. and B. contracted *inter se* that each should have a right of pre-emption in respect to the other's property, held, in a subsequent suit by C. to pre-empt property sold by B. to D. in the same locality, it would not amount to an admission of the custom of pre-emption.

(ii). P. R. 99 of 1900.

Where the vendee's brother purchased property adjacent to the pre-emptors, and he, the vendee's brother, got a mortgage thereafter on the house sold, agreeing with the pre-emptor that in case he bought the house in suit he would give part to pre-emptor, held, that as it could not be held to be an agreement recognizing the pre-emptive title of the pre-emptor, even when signed by the vendee, it would not amount to an estoppel.

(r). Failure of landlord to proceed under section 53, Tenancy Act, on sale of occupancy holding.

P. R. 22 of 1901.

In a suit for pre-emption of an occupancy holding, held, that a landlord who was also an occupancy tenant in the same village, served with a notice under section 53, Tenancy Act, who sued to pre-empt as an occupancy tenant, was at liberty to claim pre-emption under either of his qualifications, and his failure to proceed under the Tenancy Act did not bar him from resorting to the Civil Court or constitute acquiescence or waiver of his right.

(s). Omission to raise pre-emption as a defence in a previous suit for possession.

(i). P. R. 29 of 1888.

The case shows that it was not considered necessary for the defence, that the sale was without necessity should be put up by reversioners of the alienor, who were then parties.

The judgment refers to the possibility of a future claim.

(ii). IX All. 234.

The Court below was wrong in holding that the plaintiff in a pre-emption suit, also mortgagee of the property, by reason of his having omitted in a suit, previously brought against him by the vendees for redemption of his mortgage and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by acquiescence in sale from asserting his pre-emptive rights.

(iii). XXVI All. F. B. 61.

The owner of a certain share in a village mortgaged three-fourths of his share to R. C. and then sold the entire share to D. P. D. P., the purchaser, sued R. C. to redeem and got a decree. Then R. C. who was a co-sharer in the village sued to pre-empt against D. P. and the vendor.

Held, the fact that R. C. had not advanced his claim to pre-empt in D. P.'s suit to redeem, did not have the effect of making R. C.'s claim for pre-emption *res judicata*.

I All. 75, III All. 189, XX All. 516, expressly dissented from.

The same result follows from the rulings that such a defence could not have been put up in a former suit.

(i). P. R. 32 of 1884, C. A. 1267 of 1882.

Plaintiffs who were the purchasers under a registered deed of sale of certain land of which the defendants were mortgagees, and of which they had also taken a registered deed of sale subsequently to the plaintiff's deed, and containing express mention of the prior conveyance to plaintiffs, sued the vendor and the mortgagees for possession. The mortgagees challenged the validity of plaintiff's conveyance and relied upon the conveyance to themselves, and subsequently two of them raised a plea that they were entitled to a right of pre-emption over the land conveyed at the market value. Held, such a plea was no answer to the plaintiff's suit, and was inadmissible, the proper course being for these defendants to bring a suit to enforce the right claimed.

(ii). VII All. 892.

A co-sharer in a village in possession of the land in suit cannot resist a claim by a purchaser from another co-sharer to obtain possession thereof by pleading he had a right of pre-emption. If he has such a right he is competent to assert it in a separate suit but not as defendant in this suit.

(iii). XXVII All. 78.

The plaintiffs sued as purchasers of part of the equity of redemption of a usufructuary mortgage to redeem the mortgage and recover possession of a proportionate part of the mortgaged property. One of the mortgagee-defendants pleaded that he had a right of pre-emption in respect of the sale which formed the basis of the plaintiff's title and was ready and willing to exercise such right.

Held, this plea could not be admitted as an answer to the plaintiff's suit for redemption.

Contra : -

(i) I All. 175.

Where the defendant purchased an estate in the plaintiff's possession and sued to recover possession of it, and the plaintiff resisted the suit merely on the ground that he was the auction purchaser of it, so denying the title of defendant's vendor, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property under the sale which they had denied, a claim which might have been asserted in reply to the former suit, inasmuch as it would have been a good answer to the claim then advanced that the sale on which it was founded was invalid, in that defendant was entitled to a prior right of purchase and ready to exercise it, held, he was debarred from suing to enforce such claim.

(ii). I All. 316, S. A. 998 of 1876.

Where defendants purchased an estate in plaintiff's possession and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that the sale to the defendants was fraudulent and without consideration, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit, held, he was debarred from suing to enforce the claim.

(iii) III All. 189, S. A. 364 of 1878.

S. and B. jointly sued N. for the redemption of a mortgage of an 8-anna share of a village, B. suing as the purchaser from the mortgagor of a moiety of such share. N. did not, in defence of such suit, assert a right of pre-emption in respect of such moiety, although such right had accrued to him on its sale by the mortgagor to B. S. and B. obtained a decree in such suit and the mortgage was redeemed. N. subsequently sued B. and his vendor to enforce his right of pre-emption in respect of such moiety.

Held, that it was incumbent upon N. in the former suit to have asserted in defence his right of pre-emption in respect of such moiety, inasmuch as if that right had been established, it must, so far as B. was concerned, have proved fatal to his title to redeem, and that as he had not done so, the suit to enforce his right of pre-emption was barred by the provisions of section 13, Ex. II, C. C. P.

NOTE.—The Judges, however, said :—" It is not without doubt that we feel ourselves constrained by prior decisions of this Court."

(iv). XX All. 516.

A defendant in a suit for the recovery of possession of immoveable property, pleaded only a right to the proprietary possession of the property in suit

in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently the plaintiffs sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption.

Held, the suit must fail inasmuch as the plaintiffs' claim was one which he might have made, when defendant in the former suit, as an alternative to his defence of title.

(t). Being a mortgagee and suing on his mortgage before pre-empting.

P. R. 99 of 1910.

There is no waiver where the mortgagee sues for his mortgage rights and keeps his right to sue for the equity of redemption.

(u). Mere presence at sale.

P. R. 7 of 1912.

Mere presence of plaintiff at the time the bargain was struck does not prove acquiescence in a sale.

For further instances of waiver see—

- (a). Procedure, Notice—Chapter IX, p. 298 *et seq.*
 - (b). Taking of whole bargain—Chapter IV, p. 135 *et seq.*
 - (c). Seeking the benefit of another—Chapter IV, p. 155 *et seq.*
 - (d). Bargaining with the right—Chapter IV, p. 157.
 - (e). Suing to pre-empt with a stranger—Chapter IV, p. 164.
 - (f). Purchasing along with a stranger—Chapter IV, p. 159.
 - (g). Loss of statutory qualifications—Chapter IV, pp. 170, 172, 177, 179, *et seq.*
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CHAPTER XI.

MARKET PRICE AND PRICE PAYABLE.

1. Summary of law.
2. Miscellaneous points—
 - (1). Question of contract prices.
 - (2). *Onus* of proving price fixed in good faith or paid.
 - (3). Good faith.
 - (4). Interest on prepaid amounts.
 - (5). Fancy price.
 - (6). Price exceeding market value.
 - (7). Price in good faith fixed or paid is price payable.
 - (8). Considerations for determining if price has been fixed in good faith.
 - (9). Market price when payable.
 - (10). Inclusion of old debts.
 - (11). Where price paid is indeterminable.
3. Price payable in foreclosures.
4. Matters to be considered in determining the market price,

CHAPTER XI.

MARKET PRICE AND PRICE PAYABLE.

1. Sections 25, 26 and 27 of the Act deal with the price to be paid by the successful pre-emptor. The wording of the sections is perhaps not very happy, but the law may be summarized thus :—

(1). In case of sale the price to be paid is the price actually fixed in good faith or paid between the vendor and vendee. The words in the Act of 1905 were paid or fixed in good faith, but, though there is an apparent change, there is in effect none.

If the Court is not satisfied that the price stated was fixed in good faith or paid then it shall ascertain the market value of the property and fix that as the price payable.

P. R. 87 of 1911.

Section 22 provides that whenever the price has been fixed in bad faith, the market price must be fixed, and taken as the price to be paid.

This rule is subject to one exception, viz., where the consideration consists mainly or entirely of old debts and the total of such debts greatly exceeds the market value of the property, the Court shall determine the market value and give the vendee the option of selling to the pre-emptor at that price, or of cancelling the sale *in toto*.

It should also be noted that, though the market price is not to be considered as the price payable unless and until it is found that the price stated was not fixed in good faith or paid, the market value of the land can be ascertained and considered as a relevant piece of evidence to determine whether the price stated was fixed in good faith or paid.

(2). In the case of a foreclosure of a mortgage the price to be paid is what is actually due under the terms of the mortgage, provided that such amount is claimed in good faith ; if the amount claimed is not really due under the terms of the mortgage or is not claimed in good faith, the price to be paid is the actual market value of the land.

(3). To determine what is the actual market value of the land the Court shall consider amongst other points :—

- (i) —the price actually paid or payable or due on the footing of the mortgage.
- (ii) —the interest included in such amount ;
- (iii) —the average annual profits of the property ;
- (iv) —the land revenue assessed ;
- (v) —the value of similar property in the neighbourhood ;
- (vi) —prices realized in previous sales and mortgages.

The primary rule therefore in regard to sales is that the price payable by the pre-emptor is the price *bonâ fide* fixed or paid by the vendee, whether it exceed or be below the market value. If it was not fixed in good faith or paid, the market value is the amount payable, but, as one of the considerations which has to be looked to to determine the market price is the price fixed, it follows that in no case where the price agreed upon is less than the market value is the market value the price to be paid. In such a case the price payable would be the price stated at most.

2. We have now to consider various points arising out of this summary.

(1). In modification of rule (1), that the price payable is the price fixed in good faith or paid, it has been held by the Allahabad Court, but not followed by the Punjab Court, that where there was a price fixed by contract at which sales in a particular area should take place, a pre-emptor is not bound to pay more than such rate.

Authorities :—

N. W. P. S. D. A. Rep. 1865, p. 163, N. W. P. S. D. A. Rep. 1865, p. 365, N. W. P. S. D. A. Rep. II, p. 10, VIII All. 102 F. B., X All. 621, XXVI All. 12.

Contra :—

P. R. 49 of 1881.

There can, I think, under the Pre-emption Act, be no doubt that a sale cannot be taken over at an arbitrary rate fixed by a *Wajib-ul-arz*, whether we regard the *Wajib-ul-arz* as a contract or a mere record of custom, for the simple reason that pre-emption in the Punjab, so far as it relates to agricultural land and village immoveable property, is no longer a right based either on custom or contract, but on express legislative statute.

(2). The *onus* of proving that the price alleged to have been paid was actually fixed in good faith or paid rests on the vendee.

I state the rule thus inasmuch as the latest authority of the Punjab Chief Court is to that effect, but there is no doubt that the general weight of authority is to the opposite effect, and the vast majority of

rulings lay down that the initial *onus* is on the plaintiff to show that the price was not paid in good faith, but state further that the very slightest evidence suffices to shift the *onus*.

(i). P. R. 102 of 1890.

Where the plaintiff alleges—and defendant denies—that the price was not fixed in good faith, the vendee should be called on to prove as strictly as possible that the price entered in the deed was actually paid. The fact is especially in his knowledge and the *onus* of proving it was paid lies on him as against the pre-emptor. The most the plaintiff can be justly called upon to do is to rebut proof of payment when given by the vendee.

Cf. P. W. R. 134 of 1912.

Where a large sum is said to have been paid a day before registration very strong evidence is necessary to prove its payment.

Contra :—

(i). P. R. 38 of 1875.

The pre-emptor who has refused to buy at a price offered must show that the offer was not made in good faith, i.e., either that the land was offered to him at one price and sold at another and lower price, or that the land, though sold at the same price asked from him, was sold at a fictitious price not representing the true value of the land.

(ii). W. R. Jan., July 1864, p. 304.

Where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the *onus probandi* is on him to show that the property had in fact been sold below the stated price.

(iii). XIII W. R. 439, S. A. (All). 572 of 1881.

Slight evidence on the part of the plaintiff-pre-emptor, on whom the initial *onus* lies, would be sufficient to throw on the other party the burden of meeting it with some other evidence.

(iv). V All. 184.

We are of opinion that the rule laid down in W. R. 1864, p. 304, cannot be accepted in the unqualified terms in which it has been stated. It seems to us that in a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the *onus probandi* is *primâ facie* on him to show the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish the case, and when such case is established, it rests on defendants to prove by cogent evidence that the stated price is the correct one.

(v). X All. 225.

In suits for pre-emption, where the amount of the consideration for the sale is in dispute, the rule as to burden of proof is that, in the first instance, the plaintiff, who alleges the price stated in the deed of sale to be fictitious, must give some *primâ facie* evidence which would lead to the presumption that the price so stated was not the true price. Having done that it then lies on the vendor and vendee, who set up the price as true and genuine, to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence.

As a general rule how can that be done? The plaintiff in a case of this kind would not be a party to the transaction out of which the sale to a

stranger arises. He would not, as a rule, have any actual knowledge of what the real price was. In the majority of cases the only *prima facie* evidence which the plaintiff could produce would be either evidence showing that the vendor or vendee had made an admission that the price was fictitious, (and this could only happen in rare cases), or evidence showing that the market value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged contract price was not the real price.

Held also, that where the price stated in the deed of sale was nearly five times the market value of the property sold, and the purchaser gave no explanation showing why he was willing to purchase the property at a price apparently so extravagant, there was sufficient evidence upon which to find that the price alleged in the contract was fictitious.

(vi). VI All. 344.

Where plaintiff in a suit to enforce a right of pre-emption impugns the correctness of the price stated in the instrument of sale, the *onus probandi* is on him to show the price fixed was not the price paid, but very slight evidence is ordinarily sufficient to establish the case, and when that is established it rests on the defendants to prove by cogent evidence that the stated price is the correct one.

(vii). IX All. 471.

It is for the plaintiff either to show what was the actual contract price, or to give substantial evidence on which the Court can act, showing what was the market value at the time of the sale.

(viii). XXIX All. 618.

When a plaintiff-pre-emptor comes into Court, alleging that the price entered in the sale-deed is fictitious, it rests on him to give some *prima facie* evidence that this is the case. But comparatively slight evidence is sufficient for this purpose, and it will then be for the parties to the sale to show the price alleged to have been paid was actually paid.

Payment of a sum equal to 67 years purchase was held sufficient to shift the *onus probandi* on to the vendee.

(3). The term "Good faith" is defined in Punjab General Clauses Act, I of 1898, section 2, clause 22, thus :—

"A thing shall be deemed to be done in good faith, where it is in fact done honestly, whether it is done negligently or not."

Consequently the sole test of good faith is the honesty of intent in fixing the price in the sale-deed.

It of necessity implies that the consideration will pass and will not be refunded.

(i). P. R. 10 of 1884.

If the payment was no mere pretence, but was actually made, there being no arrangement that the money should be handed back out of Court, or that the vendor should receive credit for it in any other way than as payment of the price of the land, we think it impossible to hold that the price was not fixed in good faith simply because the Court thinks the land is worthless.

(ii). P. R. 75 of 1901.

Good faith is not defined anywhere in the Act (Punjab Laws Act, 1872). It is ordinarily an equivalent of the Latin phrase "*bonâ fide*," which has somewhat varying meanings given to it in different branches of the law, there being a common element, however implied in all, *viz.*, that the act of which it is predicated was done honestly.

It is an expression introduced from English law in which it may be stated generally that the words have no technical legal signification, but are to be taken in their ordinary acceptation and mean simply honesty in belief, purpose or conduct.

In some cases inquiry and care is required to constitute good faith as in the Penal Code, section 52.

The sense in the section under discussion appears to be honestly, and all others are excluded.

Now, "honestly" applied to the fixing of the price of the property sold, which is subject of pre-emption, must import this much, that the price fixed was meant to be actually paid, and was not to be a false and fictitious one in order to make out the value to be higher than the reality and to defeat pre-emption.

(iii). P. R. 47 of 1909.

The sole test of good faith under the Act is that the money, which is alleged to have been paid, shall have been paid finally and the bargain concluded and maintained without subsequent modification or diminution in the price by return of a portion of the purchase-money or otherwise.

It will be seen that P. R. 10 of 1884 and 47 of 1909 refer to payments in good faith and the phrasing of Act II of 1905 shows clearly that the words "in good faith" qualified both "paid" and "fixed."

It is difficult to understand why the Legislature appears deliberately, in the Act of 1913, to have removed the qualification of "good faith" from payment, unless it be a desire to emphasize what has rarely been disputed that the payment of a fancy price is a good payment.

There will, no doubt, be a tendency to think that passing of consideration is sufficient to establish the price has been paid, but it should nevertheless be clearly stated that the rulings—P. R. 10 of 1884 and 47 of 1909—still hold good, and that the price paid must be a price paid without any possibility of return or modification. If the price paid is subject to return or modification, it is the lesser sum, after such return or modification, that must be regarded as the price paid.

See also P. R. 114 of 1912, which discusses the origin and meaning of the phrase "paid or fixed in good faith" under Act II of 1905.

(4). Though the pre-emptor is not bound to pay interest levied on prepaid amounts, the inclusion of such interest in the price fixed does not mean the price was not fixed in good faith.

C. A. 486 of 1908.

In this case the price fixed was Rs. 31,762, which included Rs. 476-8-0 as interest on sums paid prior to the execution of the sale-deed.

Held :—Plaintiff was not liable to pay the Rs. 476-8-0, but the mere fact he was not legally bound to pay the interest does not mean that the parties to the sale did not fix the price in good faith.

(5). The mere payment of a fancy price, if that fancy price had been honestly paid, was never a reason to hold that it was not paid in good faith, and where a fancy price had been honestly paid, that price was the price payable. It is apparently to remove any lingering doubts on the subject that the present section has been framed as it has.

(i). P. R. 49 of 1881.

I do not feel certain we could hold the vendor could be compelled to sell at a lower price than he has sold at if such lower price was found to be the market price, if, as pleaded in this case, he was only tempted to sell by the high price offered. As there is in this case no reasonable suspicion that the price was not paid, and no reasonable suspicion that the price was paid, not in good faith, but merely to prevent the other from asserting his right of pre-emption, the sale must be upheld.

(ii). P. R. 24 of 1901.

We are by no means prepared to say that, if a vendee, especially desirous to secure certain property, says, "Your price is so much, but, in order to avoid pre-emption claims, I am prepared *bonâ fide* to add a certain sum and pay it *bonâ fide* as the price of any preference, so that pre-emptive claims may be rendered less likely," and actually does so, a pre-emptor would be entitled to oust the vendee for any less sum than that actually paid.

(iii). P. R. 75 of 1901.

The law of pre-emption, though it does operate to keep down the price of property to some extent by hampering transfers, is not intended to have that effect: it merely aims at protecting the prior rights of certain persons on specific grounds, and, as it stands, cannot be interpreted to deprive the owner of the right to make the most he can of his property, and there is nothing improper to demand or pay a price much above the market value, and therefore in a case for pre-emption where the price entered in the deed of sale, though considerably above the market value, was not shown to be fictitious and where there was no proof or indication that any portion of it was refunded or otherwise appropriated, held the price was fixed in good faith.

The law does not intend that the pre-emptor may claim a reduction in price on the ground it is excessive and so militates against his right.

In the particular case the actual market value was Rs. 1,400, and the price paid was Rs. 2,500.

(iv). P. R. 68 of 1902.

The law of pre-emption does not allow a pre-emptor to take objection to a price actually and genuinely paid on the ground that it is a fancy price, the market value being no test of what should be paid by a pre-emptor until the price mentioned in the deed is shown to have been fixed not in good faith; therefore, in a pre-emption case, though there was admitted enmity of a bitter type between the pre-emptors and vendees and the latter paid what was undoubtedly a fancy price, with the knowledge that these tactics would annoy and defeat the pre-emptors, held the price was not fixed in bad faith.

The market value was Rs. 500, the price paid Rs. 1,500.

(v). P. R. 13 of 1908.

A person who, in his anxiety to purchase a particular plot of land or to purchase land in a particular village, gives a fancy price is acting in good faith

in the meaning of section 22, though his intention is to render it practically impossible for anyone with a superior right of pre-emption to oust him.

(vi). P. R. 47 of 1909.

If it is the vendee's fancy to pay a price which he is prepared to pay for reasons of his own, he is perfectly entitled to do so.

(vii). IX All. 225.

The purchaser might possibly have shown that there was some special reason why he was willing to give so large a price in order to buy a share in that particular village, as, for instance, that he was, from the propinquity of other property of his, desirous of obtaining the status of a co-sharer in that particular village, or that he was doubtful of the stability of his debtor, the vendor, and so purchased this property, even at a heavy sacrifice, in order to obtain something tangible in the way of payment.

(viii). XXIV All. 119.

Assuming the price paid by the vendee is a high price, if it has admittedly been paid, there is nothing more to be said.

(ix). XXVIII All. 617.

There is no objection to fixing prices so as to prevent pre-emption, provided the prices are paid. It should be borne in mind as an elementary fact in pre-emption law that, if a vendee is willing to pay even a fancy price many times its value for certain property and does pay it, the pre-emptor, who wants to take over that property, can only do so on payment of that fancy price.

(x). XXIX All. 618.

Dictam approved :—"If a purchaser is prepared to pay a fancy price for a property, a pre-emptor is bound to pay that price also; if the actual price paid is satisfactorily established, that is an end of the matter."

There are indications in two rulings of the Chief Court that the payment of a fancy price for purposes of securing a footing in a village might amount to payment *mala fide*, but, in view of the rulings given above, and the new frame of section 25, these indications should not be acted upon.

The two rulings are :—

(i). P. R. 49 of 1881.

Plowden, J. :—

A case might arise in which the price fixed was so obviously a price fixed with intent to defeat the right of pre-emption and introduce a wealthy stranger as to indicate a transaction amounting to a fraud against the right, and in such a case it might very properly be held that an offer at such a price, even if it was actually paid, was not a *bona fide* offer.

Brandreth, J. :—

Owing to the unfortunate wording of the pre-emption sections in Act XII of 1878, unless the village is one held on ancestral shares any stranger, who can get any footing by purchasing even an acre of land, can thereafter purchase

any other land in the village at any price at which he can obtain it, and may thus entirely break up and destroy the village community.

It is therefore worth the while of the would-be intruder to pay any price for the first acre. He can then, if many of the villagers are in debt to him, get the land transferred to him for his claims and the village owners cannot stop the transfer, whatever price they might now be willing to offer. I should therefore be prepared, where the extra price is only paid to get a footing in the village, to construe the Act very strictly.

(ii). P. R. 75 of 1901.

A case might arise in which the real object of the purchaser is to acquire the property, not as an investment, but solely to annoy and injure an enemy. Here, if a very high price is actually paid, it may be possibly argued with reason that the price was not fixed in good faith, *i. e.*, honestly, a good portion of the consideration being for a purpose not honest.

Both of these dicta are *obiter dicta* and not decisions on facts before the Court. They are opposed to the findings on facts already given above, and it should be again impressed that the only question is whether the price has actually been paid without intention of return. If the price has been paid, that ends the matter, and the motives which have induced the vendee to part with a higher sum than the market value have no more to do with the question than the motives which may induce a pre-emptor to come forward and claim pre-emption.

(6). At the same time it should be noted that where the price alleged to have been paid is greatly in excess of the market value the fact may be taken into consideration in determining whether the price alleged to have been paid has been actually paid.

(i). P. R. 69 of 1882.

The market value would be important evidence on the question whether the price stated in the deed was a price fixed in good faith.

(ii). P. R. 102 of 1890.

To prove the land was not sold at the price alleged, a defendant can, generally speaking, only do so indirectly by evidence that the land sold was not worth the price said to have been given.

(iii). P. R. 75 of 1901.

Where the price alleged to have been paid greatly exceeds the market value, the Court may draw the conclusion that the money ostensibly paid did not actually pass as the consideration for the sale, but was refunded in some shape or other.

(iv). IX All. 471, *vide* p. 352.

The Court is entitled therefore, I consider, in all cases of pre-emption to determine the market price, not necessarily in order to fix the price payable, but as a piece of evidence to determine whether the price alleged to have been paid has actually been paid.

(7). It also follows that where the price has been fixed in good faith or paid, the Court must direct that price to be the price payable, and should not fix the market price as the price payable, though, as already pointed out, the Court can and should determine the market price as a piece of evidence to determine whether the ostensible price was or was not paid, or was or was not fixed in good faith.

It is only when the price alleged to have been fixed in good faith or paid has been found not to have been so fixed or paid that the Court should proceed to determine the market price as the price payable.

This is a very salutary rule, but there is danger of the rule being misapplied. The price paid or the price fixed in good faith is the price payable and if the Court is satisfied that the price was fixed in good faith or was paid its functions terminate. But, as already noted, that does not mean that the market value is not to be considered in evidence as to whether the price has been paid, or was fixed in good faith or not. The test of the market value of the land is always important to determine whether the price has or has not been paid or the price fixed has been fixed in good faith, and the determination of the market value is therefore relevant to the question whether the price has been fixed in good faith or paid. Where, for example, a very high price is paid or fixed, the Court should enquire what is the market value. If it be found that the price alleged to be paid or fixed is greatly in excess of the market value, there is at once a presumption that the price alleged to have been paid has not been fixed in good faith or paid, and the vendee must be expected to give some reasonable explanation as to why he agreed to pay so high a sum.

If he can give a reasonable explanation, and if it be shown, with due regard to *onus probandi*, that the amount has been paid or fixed in good faith, then that is the price payable, and the Court is not competent to fix the market value as the price payable. If, however, the price has not been fixed in good faith or paid, then the market price is the price payable.

The point is that the market value may be determined for two purposes:—

(i), as relevant evidence to show whether the price alleged to have been paid has or has not been so paid, or the price fixed was fixed in good faith or not.

(ii), as a basis for fixing the price payable when the Court is satisfied that the price fixed has not been fixed in good faith, or paid.

The fact that the law rightly postpones the fixing of the market value as the price payable until the Court is satisfied that the alleged

price has not been paid or fixed in good faith, nowhere excludes the consideration of the market value as relevant evidence to the question whether the alleged price was so fixed or paid.

Subject to this explanation, therefore, it is good law that the market price cannot be considered to determine the price payable until it has been held that the price alleged to have been paid has been fixed in bad faith or not paid.

(i). P. R. 69 of 1882.

In regard to price the proper issue is—"Was the price named in the deed fixed in good faith or not?" and not—"What is the fair market value?" It is only if the first matter is answered in the negative that the second issue arises. A price higher than the market value is not necessarily a price fixed in bad faith, as the difference may be satisfactorily explained, but to prove whether the price has been fixed in good faith, the price actually paid is important.

(ii). P. R. 10 of 1884.

It is only in case the price fixed is not fixed in good faith that any question of market price arises.

(iii). P. R. 56 of 1907.

Before the Court proceeds to assess the market value in pre-emption cases and to call upon the plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith.

(iv). P. R. 114 of 1912.

If the price mentioned in the deed of sale is actually paid to the vendor, no matter whether it is more or less than the market value, it must be held to have been fixed in good faith, and it must be paid by the pre-emptor. If the price entered in the sale-deed was fixed or paid in good faith, the question of the market price cannot be gone into by the Court.

(v). VI All. 314.

In determining the amount of the price which a pre-emptor has to pay, the Court is not called on to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands in consideration for the sale.

(vi). XXVIII All. 617.

Where A agreed to buy from B 10 villages for one total price, but by subsequent agreement between A and B 10 separate conveyances were executed, showing 10 separate prices, held in a suit for pre-emption that, if it was proved that the consideration mentioned in the sale-deed had been paid and received, the Court should not look further and ascertain the value of the property in suit by a consideration of the annual profits or of the amount of Government revenue.

The rule was departed from in P. R. 20 of 1899. The sale there was for Rs. 450, and the Judges held that, though that sum probably passed, Rs. 400 only could be allowed, as that was the market value.

(8). In determining whether the price fixed has been fixed in good faith, the following rules should be observed :—

(a). Where the price stated is shown to have been paid, the *onus* of proving that it was not fixed in good faith rests on the pre-emptor.

P. R. 102 of 1890.

If the price entered in the deed is the price actually paid, the *onus probandi* that it was not fixed in good faith, lies on the pre-emptor.

(b). Where the price stated is shown not to have been paid, that is proof that the price so stated was not fixed in good faith.

P. R. 102 of 1890.

If the price actually paid is less than what is entered in the sale-deed, it follows it was not fixed in good faith.

(c). Mere entry in the sale-deed of the price is no evidence as against the pre-emptor, but it is evidence as against the vendee to show that nothing more was paid than what is so entered.

(i). P. R. 20 of 1881, Note.

When a price is mentioned in a deed, there is no reason to suppose the price would be under-stated.

(ii). P. R. 102 of 1890.

The price entered in a deed of sale, whether registered or not, is no evidence as between the pre-emptor and the vendee that that price was paid.

(iii). V All. 184.

The plaintiff-pre-emptor cannot be held to be bound by the recital in the deed of sale.

(d). Previous negotiations to sell at a lower price are evidence that the price was not fixed in good faith.

P. R. 24 of 1887.

Where there were previous negotiations to sell to a plaintiff at a price lower than that for which the sale was ostensibly made subsequently, and plaintiff refused to buy even at such lower price, held such negotiations were evidence that the subsequent price was not fixed in good faith.

(9). Once it is determined that the price stated was not fixed in good faith or paid, the market-value is the price payable, but under no circumstances should the price payable exceed the price stated.

Considerable confusion exists on this point, owing to the unhappy wording of the Act. It is frequently argued that, if it be held that the price stated has not been fixed in good faith or paid, then the market-value, whether below or in excess of that price, is the price payable. This

view is certainly incorrect, though there are no authorities on the subject, and it follows from the doctrine of substitution, which allows the pre-emptor to step into the shoes of the vendee on the same terms, that he is in no case bound to pay more than the vendee himself paid or alleges he paid.

Authorities for the general proposition :—

(i). P. R. 101 of 1887.

When the price entered in the deed or otherwise alleged by the parties has been found not to have been fixed in good faith, the price at which plaintiff can claim pre-emption is the fair market-value only, and not the price actually paid, and though the price actually paid is always an important fact to be duly considered in forming an estimate of the market-value, it must be considered in connection with other facts.

(ii). IX All. 471.

Where the Court has come to the conclusion that the price alleged is not the true contract price, and when it cannot ascertain the true price by reason either that the vendor or vendee refuse to disclose the same by their own evidence or their evidence cannot be believed, the Court should ascertain, if possible, what was the market price of the property in dispute at the time of the sale and accept that as the probable price agreed upon between the parties.

(iii). XXIX All. 618.

IX All. 471 quoted with approval.

(iv). Pre-emption Act, section 25 (1).

(10). When the price at which the sale purports to have taken place represents entirely or mainly a debt greatly exceeding in amount the market-value of the property, the Court shall fix the market-value as the price payable, and may put the vendee to his option either to accept such value as the full equivalent of the consideration for the original sale or to have the said sale cancelled, and the vendor and vendee restored to their original position.

The first part of this proviso to section 25 reproduces the old case law on the subject, and the latter part an entirely new principle in pre-emption law, *viz.*, the cancellation or withdrawal from a sale once made. It should be noted that the Court is not bound to give the vendee any option, and no rules are given as to the circumstances under which the Court should exercise its discretion on the point.

This proviso, it should be noted, is however much stricter than the old rulings, for, in the old rulings, in addition to showing the debts exceeded the value of the property, it was necessary to show that the vendor had no means of otherwise satisfying the debts. That is no

longer the case under this section, and all that it is necessary to show is that the debt for which the property is sold exceeds the value of the property.

Care should therefore be taken to eliminate other considerations than these.

As to whether a debt greatly exceeds the value of the property is a question of fact.

The following are the old rulings on the subject :—

(i). C. A. 585 of 1890.

The sale was for Rs. 1,880, all old debts. The value of the land was found by a commissioner to be Rs. 1,500, and that amount was fixed as the price payable.

(ii). P. R. 75 of 1901.

There may be cases where the price is correctly stated in the deed and is meant to pass as between the vendor and vendee, but which is not fixed in good faith, so far as the pre-emptor is concerned, *e. g.*, where the vendor owes the vendee large sums of money, and has no other assets and the whole debt is discharged by the transfer. Here the debts being wiped out the full consideration stated in the deed may be said to have passed, but the true consideration was not the nominal value of the debts, *i. e.*, their arithmetical total, but their present or market-value.

This is an intelligible proposition, but here the essential distinction appears to be that the purchase-money is not cash paid down but pre-existing liabilities discharged.

(iii). P. R. 77 of 1901.

In a case for pre-emption where the transfer was in satisfaction of old debts, if the market-value of the property does not appear to differ very materially from the amount of the debts due from the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be said to have been fixed in good faith, but where the disparity between the market-value of the property and the sum, in satisfaction of which it has been accepted, is very great and the debtor is clearly insolvent, and the property taken in satisfaction was practically the debtor's only asset, the market-value of the property is the proper test of the consideration paid, and not the nominal amount of the debts due.

(iv). P. R. 22 of 1906.

Where the market-value of property is conspicuously below the price stated in the sale-deeds and a large part of the consideration consists of old debts due to the vendee, the arithmetical value of old debts cannot be taken to be the real value of that part of the consideration, the real value being the value of the old debts as claims, not as cash.

(The sale in this case was for Rs. 8,000, 1,000 cash and 7,000 on a mortgage-deed which contained many old debts and interest.)

The market-value was Rs. 3,500 for which amount pre-emption was allowed.)

It is true that in 75 of 1901 and 77 of 1901 an important feature was that the debtor was insolvent or that the property sold was his only asset, but

the same principle applies when as here (a) the debts are old and made up largely of interest, (b) there is great discrepancy between the price fixed and the market-value.

(v). P. R. 56 of 1907.

The fact that the consideration for a sale consists of old debts made up largely of interest is not in itself a sufficient reason for finding the consideration entered was not fixed in good faith. In such a case where the vendor owns other property and is not insolvent and there has evidently been a conscious adjustment of value, not merely a wiping out of a debt regardless of amount in exchange for the land, there is no natural presumption the price was fixed in bad faith.

Here the price was Rs. 1,300 due as principal, and Rs. 2,700 as interest.

(vi). IX All. 225.

Where a debtor sells land to his creditor at 5 times the market-value, the mere production of 2 bonds on which the purchaser relies does not reshift the burden of proof upon the plaintiff, the production of the bonds is only one of the steps the purchaser should have taken to satisfy the Judge that the alleged price was the real one.

The law, as it stands now, is succinctly given in—

P. R. 47 of 1909.

The price entered in a deed of sale is fixed in good faith within the meaning of section 22, Pre-emption Act, if it is actually paid for the property sold, but in case of a transfer in satisfaction of old debts, it is for the Court to find out whether the actual value of the debt amounted to its face value or not, and in case of its arriving at the latter conclusion, it should ascertain the market-value of the property.

An instance of greatly exceeding the market-value is given in—

P. R. 54 of 1911.

Where the consideration money for a sale Rs. 1,200 was made up of previous debts and the market-value was found to be Rs. 780, held the proviso to section 22 was applicable.

In this case, though the Divisional Court had given no option to resale, the Chief Court declined to interfere, as the power is discretionary.

(11). Where the actual price paid is indeterminable the price payable is the market-value.

This necessary provision does not appear in the Pre-emption Act which merely deals, so far as sales are concerned, with prices fixed or paid in good or bad faith. Where it is, however, impossible to determine whether the said price has been so fixed or paid, it is necessary to have some standard of appraisal, and the rule given above is deducible from rulings.

(i). P. R. 54 of 1889.

Where B made an agreement with A, promising A that if he A brought a suit for B and was successful therein, B would give $\frac{1}{2}$ in consideration thereof

and, having done so, B conveyed to A $\frac{1}{2}$ whereupon C sued to pre-empt, held, it being impossible to say any particular price was fixed in good faith, the plaintiff must pay the market-value of the property.

(ii). P. R. 2 of 1903.

Where part of the consideration for the sale consisted of favour and past services, held the market price must be paid

(iii). P. R. 70 of 1905.

Where custom allows pre-emption of gifts, such transfers would be transferred to the pre-emptors, not as gifts for nothing, but on payment of the proper market-value of the gifted land

(iv). VII All. 626.

Where in a case the pre-emptors cannot give the thing for which the vendor agreed to exchange his land, they have the right to obtain the land for an equivalent in money, *i. e.*, the value of the property given by the vendee.

3. In a suit to pre-empt on foreclosure of a mortgage the new Act of 1913 has introduced two charges, one probably unintentional, one intentional.

In section 26 the words "due under the terms of the mortgage" take the place of the words "due on the footing of the mortgage;" but it is peculiar that the old words are retained in section 27 (a). The alteration appears to be due to inaccurate drafting, and the two sections are irreconcilable if it is to be considered that there is any difference of meaning in the two terms. If there is no difference in meaning, then the change was unnecessary. But it by no means follows that an amount due under the footing of a mortgage is exactly the same as due "under the terms of a mortgage," for, in a mortgage account, a mortgagor is entitled to certain credits, *e. g.*, for deterioration to the property caused by the mortgagee, which are often not provided for in the terms of the mortgage. It is difficult to say what was contemplated by the change, but I think both terms should be treated as equivalent to the "amount due on the mortgage account between parties." Taking that as our starting point we find—

(1). Interest due to foreclosure must be treated as due under the terms of the mortgage.

(i). P. R. 121 of 1894.

A stipulation in a deed that, if the principal be not paid by a certain day, the property shall be held sold for the principal, would not relieve the mortgagor from paying interest on redemption, therefore, in a claim to pre-empt, the mortgagee is entitled to treat the interest up to foreclosure as part of the purchase money, *i. e.*, up to the expiry of the year of grace, whether he has or has not obtained a decree declaring his right.

(ii). III All. 610 F. B.

In case of a mortgage by way of conditional sale where the *Wajib-ul-ars* gives a right of pre-emption, held, where under the deed the mortgagor stipulated to pay the interest annually and in case of default to pay compound interest, and, had he desired to redeem, would have been obliged to pay compound interest, the mortgagee was entitled to receive compound interest in pre-emption up to the date of foreclosure, provided the compound interest was not penal, and therefore not chargeable to the mortgagor desiring to redeem.

(iii). III All. 753.

Was a case where the Lower Appellate Court compelled the pre-emptor to pay compound interest up to foreclosure in accordance with the terms of the mortgage-deed, and the finding was not contested on appeal.

(iv). Cf. section 15, Punjab Laws Act, under which in C. A. 37 of 1902 compound interest was allowed.

(2). The account as to what is due must be made up to the date when the sale becomes absolute.

(i). V All. 187.

The pre-emptor, in case of mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such mortgage, not at the time of issue of notice of foreclosure, but at the time it becomes absolute.

(ii). VI All. 344.

A person claiming to pre-empt a *baibilwafa* must pay, as the price of the property, the entire amount due on the mortgage at the time it becomes absolute. The property vests absolutely in the mortgagee at the expiry of the year of grace, irrespective of whether he has obtained a decree establishing his right, and that is the period when the amount due has to be ascertained with reference to.

(3). The pre-emptor must pay interest up to the date he pays the purchase money.

VIII All. 502.

The question in this case was whether a pre-emptor of a *baibilwafa* could claim interest on the mortgage money from the deed to date of deposit of the purchase money. Held, the pre-emptor ought to have paid the interest for such period to the vendee.

This ruling, however, I contemplate would not be acted upon unless the pre-emption decree provided therefor.

(4). Where the mortgagee foreclosing sells to a third person, the pre-emptor can pre-empt on the amount due on the mortgage.

87 of 1894 F. B.

If a mortgagee forecloses and then sells to a third person, in recognition of his pre-emptive rights, at a higher rate, a pre-emptor with still superior rights can pre-empt on the amount due under the mortgage, and is not bound to pay the higher rate.

(5). The amount for which foreclosure has been obtained is not conclusive against the pre-emptor as to the amount due.

VI All. 344.

Held a proceeding under Regulation XVII of 1806 foreclosing a mortgage by conditional sale is not conclusive as to the amount of the purchase money against persons subsequently claiming to enforce the right of pre-emption, and raising the question as to the amount of the purchase money. Also, a decree in a suit to foreclose a mortgage by way of conditional sale cannot bind a person, not a party to the suit, claiming to enforce the right of pre-emption and raising a similar question.

(6). Where there has been a foreclosure, but not completed by possession, the dispute between the mortgagor and mortgagee having been settled by a compromise, the sum specified in the compromise is the price payable.

W. N. 1887, p. 233, XI All. 164.

The mortgagee issued a foreclosure notice, and on expiry of the year of grace a foreclosure proceeding was recorded. The mortgagee then sued for possession, but the suit was compromised and a decree passed in accordance therewith. Plaintiff sued to pre-empt the foreclosed property. Held, he was entitled only to such property as under the compromise the conditional vendor retained, and the price payable was not the amount due on the footing of the mortgage, but the amount specified in the compromise.

(7). The second change wrought by the new Act is that it is no longer a *sine qua non* that the amount due under the mortgage should not exceed the market-value. If it does exceed, and the amount is claimed in good faith, the pre-emptor will still have to pay that price, and not the market-value.

This provision overrides section 23 (2)—Act II of 1905, and P. R. 18 of 1898.

(8). But in all foreclosure cases it must be shown that, subject to the limit mentioned in 7 (*supra*), the price due under the mortgage is claimed in good faith. If it is not due under the mortgage or, if due, is not claimed in good faith, then the market-value is the price payable, provided always that in no case would more have to be paid than the amount claimed.

The same rules as to good faith apply as in sales.

Section 23 (1) (2).

4. In determining the market-value the following principles should be observed :—

(1). The best evidence of market-value is the price paid, and consideration should be paid to the price paid or to be paid.

(i). Section 27 (a), Pre-emption Act.

(ii). P. R. 29 of 1875.

In absence of proof of a different market-value, the Court may, in a suit for pre-emption, treat the sum paid as evidence of the fair market-value of the property for the time when the sale took place, and, so far as possible, the Court should hold the actual sum paid as the fair and reasonable market-rate.

(iii). P. R. 101 of 1887.

The price actually paid is always an important fact to be duly considered in forming an estimate of the market-value.

(iv). P. R. 102 of 1890.

The price actually paid is in general the best evidence of the market-value at the time of the sale.

(v). C. A. 90 of 1894.

The price actually paid is a good criterion of the market-value in the absence of special circumstances.

(vi). C. A. 318 of 1897.

The best test of market-value is the sum actually paid.

(vii). C. A. 1084 of 1899.

The price actually paid by the vendee is in general the best evidence of market-value at the time of sale.

(viii). XXVIII All. 617.

If it is proved that the consideration mentioned in the sale-deed has been paid, the Court should not look further.

(2). The amount of interest included in the price, value or amount should be considered.

Where the debt is an old one and consists largely of interest, the arithmetical value of the debt should not be fixed as the price payable, *vide supra*.

Where the transfer is a foreclosure interest should be calculated up to the date of foreclosure, *vide supra*.

(3). Interest on the purchase money is not payable between date of sale and date of decree, even where the vendee has got a decree for interest against the vendor.

(i). P. R. 10 of 1887.

The pre-emptor is not bound to pay interest to the vendee on the purchase money from the date of sale when the vendee was not entitled to recover interest from the vendor.

(ii). II All. 409.

Where the vendee is sued by the vendor for the purchase money not paid, and a decree with interest is passed, a pre-emptor is not bound to pay the interest, which is no part of the purchase money.

But if he has had the bargain offered him at the ultimate price fixed, he may be compelled to pay interest, and should in any case be burdened with costs.

XXVIII All. 617.

Where the pre-emptor, after challenging the purchase money, succeeded only on payment of the amount claimed by the vendee, he may be compelled to pay interest thereon, when he has had an offer made him before his suit, from the date of such offer till the date of payment: he should in such cases also be burdened with the costs of the vendor and vendee.

(4). The estimated amount of the average annual net assets of the property should be considered.

(i). Section 27 (c).

(ii). C. A. 318 of 1897.

27 years purchase considered a fair valuation of lands held by occupancy tenants.

(iii). P. R. 87 of 1896.

The fact that the greater portion of the land sued for is cultivated by *maurusis* detracts greatly from its value, and the amount of net income obtainable from the land is certainly a most important point to be considered in fixing its market-value.

(iv). IX All. 225.

Took 16 years purchase as a basis for calculating the market price.

(5). The land revenue assessed upon the property should be considered.

(i). Section 27 (d).

(ii). P. R. 100 of 1895 F. B.

The test that a calculation of 30 times the *jama* brings the value of the land sold up to Rs. 6,000 rather favours the view that the true value is probably not less than double that amount.

(iii). P. R. 77 of 1901.

The Chief Court ascertained that the average price of land sold from 1895-98 in the Province was 65, 70 or 72 times the *jama* and for the purposes of this case took 65 times the *jama* as a basis of calculating the market-value.

(iv). C. A. 486 of 1908.

Value of land taken to be 80 or 90 times the *jama*, less the *matikana* and *sawai*.

(v). P. W. R. 165 of 1912.

100 times the *jama* is a fair price.

(NOTE.—Since the passing of the Land Alienation Act and the recent rise in prices, the average selling value in the Punjab is approximately 104 times the *jama*).

The consideration is not of much help where the assessment is an old one, and is inapplicable where it is a dry and not a wet assessment.

(i). P. R. 102 of 1894.

The revenue was assessed nearly 20 years ago, and much may have occurred since then to alter values, especially as there has been a realignment of the canal.

(ii). P. R. 47 of 1909.

The test applied in 77 of 1901 as a very rough guide is totally inapplicable to cases in which the lands are irrigated by canals and separate payments made for the water used. In such cases the "dry" revenue paid is no guide at all.

(6). The situation of the property, the value of similar property in the neighbourhood, and the prices realized in previous sales or mortgages of the property in suit may be considered.

Old sales, however, are of little use in ascertaining the value, whether they be of adjacent property or of the property in suit, and the limit for enquiry should be the 5 years preceding the sale in dispute. To go beyond that would be unsafe.

The guide is at best a rough and unsatisfactory one.

(i). P. R. 56 of 1882.

Took into consideration the proximity of a canal to the property sold.

(ii). C. A. 318 of 1897.

Arguments deduced from the value of lands, of which the full proprietary right is subject to no rights of occupancy, are of no value at all in considering the value of land held by occupancy tenants.

(iii). P. R. 19 of 1898.

As to market-value an average deduced from other sale-deeds is of little value, because not only the quality of the land may be different, but we can never know what part of the price entered in the deeds was really paid.

(iv). P. W. R. 276 of 1912.

Old sales are of little use in determining the market-value.

(7). Where the market-value has to be determined as the price payable it should be the market-value at the time of the sale, and not the value at the time of suit, subject to any compensation for improvements.

C. A. 288 of 1898.

It is the selling value of the property at the time of sale, not what it may become after, where there is no question of improvements made subsequent to the sale by the vendee, that has to be considered in determining the price payable.

See also P. R. 22 of 1911.

Contra :—

P. R. 74 of 1875.

The market-value of the property, *i.e.* the price which the pre-emptor must pay, is the market-value at the time the action was brought, not what it may have subsequently become.

(8). When the vendee sells to a third person the pre-emptor is only bound to pay the price paid by the first vendee, and not the price paid by the second vendee.

(i). P. R. 68 of 1879.

When the customary right of pre-emption prevails the second purchaser of the property, subject to the right of pre-emption, takes a title from his vendor which is liable to be defeated by a successful claim for pre-emption against the 1st vendor and purchaser, and a pre-emptor is entitled to follow the property into his hands without being bound to pay him the sum he may have paid as purchase money in excess of the original price.

(ii). P. R. 165 of 1888.

A house was sold in execution of decree and purchased by B for Rs. 625. Plaintiff by suit got one-half released as not liable to attachment. Then B sold the other one-half to C for Rs. 500. Held, plaintiff suing on the auction-sale was entitled to get the half sold to C. for half of Rs. 625.

(iii). 87 of 1894 F. B., *vide* p. 364.

(9). Where a pre-emptor's property is sold with other property he is only bound to pay the value of the latter. But where the property sold includes property not belonging to the vendor, the pre-emptor can only recover such of the property as belonged to the vendor by payment of the price paid for the whole property.

The reason of this latter rule is that the plaintiff takes over the bargain subject to any defect in title.

(i). *Vide* P. R. 165 of 1888 *supra*.

(ii). N. W. P. S. D. A. 1863, p. 394.

In case of landed property, where the vendor is found later to have owned only part, the purchaser, if he has acted *bona fide* is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole.

(iii). V All. 382.

Certain persons sold an 8-anna share of a village. G sued the vendors and purchaser to pre-empt and got a decree. M then sued G, alleging he owned one anna 4 pies of the property sold and got a decree for possession, then in virtue of owning that share, he sued to pre-empt the remaining 6 annas 8 pies. Held his title to pre-empt being established, he was in a pre-emption suit only bound to pay a sum proportionate to the share not his, and not the whole sum paid for the sale of the whole share.

(iv). C. A. 551 of 1902.

If the proprietary body sues to pre-empt on the sale of a house made by a non-proprietor in a village, the proprietary body will not have to pay what the vendee paid for both site and building, nor is the price payable by them merely the value of the materials, inasmuch as by suing the proprietary body must be deemed to have admitted the vendor's right to sell, hence the price to be paid must be fixed with reference to the value of the house as such, less the value of the site.

(10). Where the vendee has paid money to a pre-emptor in consideration of his dropping his claim, and the pre-emptor bought off then puts up his son to pre-empt, the vendee cannot recover from the latter the sum paid to his father.

P. W. R. 182 of 1911.

(11). Where the property sold consists of a portion subject to pre-emption and a portion not so subject, the pre-emptor can take the portion subject to pre-emption on payment of a proportionate price.

(i). N. W. P. H. C. R. 1875, p. 38.

When property is sold to co-sharers entitled to pre-empt a portion of the subject of the sale, the other co-sharers can succeed in respect to such portion as they have a preferential right over on payment of a proportionate amount of the purchase money.

(ii). N. W. P. S. D. A. 1865, p. 173.

A pre-emptor entitled to pre-empt only part of property sold may pre-empt such part on payment of a proportionate amount of the purchase money paid for the whole subject of the sale.

(iii). XXVIII All. 60.

Where the sale included property subject to pre-emption and property not so subject, the case was remanded to determine the proportion of the purchase money payable for the portion subject to pre-emption.

(12). Market-value includes :—

(a). Value of rights in *shamilat*.

P. R. 12 of 1873.

It is not sufficient to value the land sold alone. The value of the rights and interests in the *shamilat* also acquired therewith must be considered.

(b). Compensation for *bona fide* improvements.

See Chapter IV. (p. 129)

Also P. R. 34 of 1875.

Case remanded to ascertain the price payable having regard to all the defendant's improvements, expenses of partition, made subsequent to sale, but before suit, and cost of partition suits, etc.

(c). *Bona fide* legal charges incurred in dealing with the property as an owner might have done.

P. R. 34 of 1875, *vide supra*.

But not

(a). Sums deducted under the contract of sale by the vendee from the purchase money.

III All. 668.

Where a certain sum was fixed as the price of the property and such was paid by the vendee, but it was subsequently agreed between him and the vendor, as part of the sale contract, that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale, and the vendee recovered such moneys, held the pre-emptor was entitled to deduct such from the original price paid.

(13). Where the pre-emptor is allowed to buy at a rate lower than that agreed on between the original vendor and vendee, the latter cannot recover from the vendor the difference in the amount, unless there be a covenant of title.

(i). P. R. 67 of 1861.

When both parties to the sale are aware of the contingency that land sold may be pre-empted, the original purchaser is not entitled, in the absence of any contract to the effect, to recover from his vendor any deficiency between the price paid by him and the price agreed to be paid by the pre-emptor for the property.

(ii). P. R. 80 of 1888.

Nor can the vendee recover from the vendor any loss that has occurred through a finding of Court as to the real price between him and the pre-emptor.

(iii). XXIV All. 514.

Where the vendor and vendee join together in entering a fictitious sum as the purchase money for the purpose of defeating the rights of the pre-emptors, and the pre-emptors successfully maintain a suit to pre-empt at a price lower than that stated to have passed, the vendee cannot maintain a suit against the vendors to recover the difference in the prices.

Contra :—

VIII All. 102 F. B.

A vendee can recover the difference between the price he paid and the price paid by the pre-emptor, where the pre-emptor buys at a rate fixed by contract less than the rate at which the vendee bought.

Of course, where there is a covenant in the sale, the vendee can recover.

Vide P. R. 111 of 1908.

(14). So, too, where a pre-emptor has paid the price ordered by the first Court, and the price payable is enhanced on appeal and the pre-emptor fails to pay such higher price, he cannot recover the price paid by suit, but must proceed under section 244, C. C. P.

X All. 354.

Where a pre-emptor pays to the vendee the price payable fixed by the first Court, and such price is increased on appeal, and the pre-emptor fails to pay the enhanced price, his case thereby becoming dismissed, neither he nor his assignee can recover the sum paid to the vendee by suit, inasmuch as section 244, C. C. P., applies to such a matter.

CHAPTER XII.

LIMITATION.

1. Provisions prior to Act II of 1905.
2. Changes by Act II of 1905 and Act I of 1913.
3. Provisions of :—
 - (1). Article 10, Limitation Act.
 - (2). Section 30, Pre-emption Act.
 - (3). Article 120, Limitation Act.
4. Application to transactions of :—
 - (1). Article 10, Limitation Act.
 - (2). Section 30, Pre-emption Act.
 - (3). Article 120, Limitation Act.
5. Matters arising out of the sections :—
 - (1). Meaning of physical possession.
 - (2). Properties incapable of physical possession.
 - (3). Physical possession to be construed with reference to the time of sale.
 - (4). Registration.
 - (5). Article 10, application of—
6. Date for computation of limitation in cases of foreclosure.
7. *Terminus a quo* in case of sale requiring sanction of Deputy Commissioner.
8. Miscellaneous points :—
 - (1). Article 120 applies where rival pre-emptors are impleaded.
 - (2). Effect of impleading subsequent vendee on limitation.
 - (3). Effect of impleading joint vendee after limitation.
 - (4). Effect of impleading one representative of vendee after limitation.

- (5). Effect of impleading vendor or his representative after limitation.
 - (6). Statements as to delivery of possession.
 - (7). Costs where no notice and suit is time-barred.
 - (8). Limitation for execution of decree.
 - (9). Article 144 inapplicable to pre-emption suits.
9. Fraud on the pre-emptors :—
- (1). Section 18, Limitation Act.
 - (2). Acts not amounting to fraud.
 - (3). Fraud must be proved by positive misstatements.
 - (4). Fraud must be within period of limitation.
 - (5). Active concealment in a *benami* purchase.
10. Section 17, Limitation Act.
11. Section 7, Limitation Act.
12. *Terminus a quo* in suits by minors.

CHAPTER XII.

LIMITATION.

1. There seems to be no subject of law in which it is more difficult to draft clearly and fully than the law relating to limitation, and this is especially the case in the Punjab Pre-emption Act.

Prior to the Act, the law of limitation was provided by article 10 and article 120 of the Limitation Act, the former prescribing a period of one year from the date of accrual of the right to sue in certain cases, all other cases not provided for therein falling under the general article 120.

2. It was the intention of the Act of 1905, which is reproduced *verbatim* in the Act of 1913, without doubt to create an uniform period of one year from the date of accrual.

Article 10 has been left untouched, and section 30 has been drafted to meet, as it was supposed, all other possible cases. As will be noted hereafter all possible cases are not met by that section and article 120 therefore still applies to certain cases.

In addition to these governing articles in the Act of 1905 section 28 was enacted to cover all cases in which the limitation was governed by article 120, and in which the right to sue had already accrued and was not barred, and the period of one year was granted in which a suit could be brought, the year dating from the commencement of the Act, but in the Act of 1913, section 28 has been omitted as its operation has ceased by the efflux of time, and no further reference to that section is now necessary. Its operation was temporary and the occasion has passed, and no possible case can arise for its future application. P. R. 143 of 1907, 74 of 1909, 131 of 1907, and C. A. 1334 of 1907, 773 of 1908 and 792 of 1908 need no further notice or comment.

3. The law of limitation applicable to all transactions subject to pre-emption is provided by articles 10 and 120 of the Limitation Act, and section 30, Pre-emption Act.

These three provisions of law run as follows :—

(1). Article 10.

To enforce a right of pre-emption, whether the right is founded on law or general usage or on special contract,

One year from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

(2). Section 30 runs:—

In any case not provided for by article 10 of the second schedule of the Indian Limitation Act, 1877, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act, shall, notwithstanding anything in article 120 of the said schedule, be one year,—

(1). In the case of a sale of agricultural land or of village immoveable property,

from the date of the attestation, if any, of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained under the Punjab Land Revenue Act, 1887, or

from the date on which the vendee takes under the sale physical possession of any part of such land or property, whichever date shall be earlier :

(2) in the case of a foreclosure of the right to redeem village immoveable property or urban immoveable property ;

from the date on which the title of the mortgagee to the property becomes absolute ;

(3) in the case of a sale of urban immoveable property, from the date on which the vendee takes under the sale physical possession of any part of the property.

(3). Article 120 runs :

Suit for which no period of limitation is provided elsewhere in this schedule ; six years from the time when the right to sue accrues.

4. Applying these rules we find that—

(1). Article 10 applies to—

(a)—sales of all kinds of property subject to pre-emption and foreclosures of urban and village immoveable property similarly subject, where physical possession of the whole subject of the sale is capable of being taken and is taken ;

(b)—sales of all kinds of property and foreclosures of urban and village immoveable property subject to pre-emption, which are made by registered deed, and the subject whereof does not permit of physical possession.

(2) Section 30 applies to—

(a)—all foreclosures of urban or village immoveable property not provided for by article 10 ;

(b)—all sales of village immoveable property or agricultural land capable of physical possession, but physical possession of the whole of which has not been taken, in which mutation has been effected or physical possession of part has been taken ;

(c)—all sales by unregistered deed or oral contract of village immoveable property or agricultural land not capable of physical possession in which mutation has been effected ;

(d)—all sales of urban immoveable property capable of physical possession in which physical possession of part, and not the whole of the property has been taken.

(3). Article 120 applies to :—

(a)—all sales of village immoveable property or agricultural land by unregistered deed or oral contract not capable of physical possession in which no mutation has been effected ;

(b)—all sales of urban immoveable property by unregistered deed or oral contract which are incapable of physical possession ;

(c)—all claims as between rival pre-emptors ;

(d)—claims against a second vendee from the first vendee ;

(e)—all other cases not heretofore provided for.

I put forward these views in regard to the applicability of article 120 with all diffidence. Section 30 begins by saying “ in any case not provided for by article 10,” and then proceeds to give the time from which limitation is to be reckoned in particular kinds of cases, omitting all mention of the cases referred to under article 120 above.

I fully recognize the apparent absurdities into which the present law, as I understand it, will lead Courts into, but if the view held is correct that is unavoidable.

For instance, the case under 2 (c) only differs from 3 (a) in the fact that in one mutation has been, in the other has not been, effected.

In regard to them, no doubt, the majority of sales are mutated in which case (3) (a) would have no applicability, but there are cases where mutation is never effected, and it is just those cases which come into Court and for which no period of limitation appears to be provided by the Act.

In regard to (3) (b) there are several kinds of sales of urban immoveable property, the subject of which does not admit of physical possession, *e. g.*, an undivided share of a house, and of which it is impossible to obtain physical possession, except by partition, which may be rightly refused on the grounds of convenience.

The difficulty would, I consider, have been entirely removed by adding to section 30 a fourth clause ;

“(4). In all other cases not hereinbefore provided for from the date on which the right to sue accrues.”

This of course would not cover the cases of impleading of rival pre-emptors, or subsequent vendees, but a claim against a rival pre-emptor is not a claim to pre-empt, and justice requires that a longer period should be allowed for impleading a rival pre-emptor than a vendee, otherwise a just claim against a vendee brought on the last day of limitation might be

defeated by the impleading of a rival pre-emptor, who also had filed his suit on the last day, and of whose existence the plaintiff could not be aware, nor is a claim against a subsequent vendee a claim on the sale in suit.

5. We may now turn to the consideration of certain points in connection with the sections relating to limitation.

(1). The first of these questions is—What is the meaning of the term physical possession?

The history of this term is interesting. In the Limitation Act of 1859 the word used was “possession,” which was interpreted to include “such possession as the property was capable of”. This was in 1872 changed to “actual possession”, and the Courts differed as to whether actual possession included constructive possession or not, or whether it was confined in its meaning to tangible possession. The uncertainty was removed by the Act of 1877, which uses the phrase “physical possession.”

This term has now been authoritatively defined as meaning corporeal or tangible possession.

(i). P. R. 97 of 1880.

The words “physical possession” do not include the idea of constructive possession, but correspond to “tangible possession.”

(ii) P. R. 49 of 1908 F. B.

Physical possession in article 10 means personal and immediate possession.

(iii). IX All. 234.

The word “physical” implies some corporeal or perceptible act done which of itself conveys, or ought to convey, to the mind of a person notice that his right has been prejudiced.

(iv). XX All. 315.

Constructive possession is not physical possession in the meaning of the said article.

(v). XXIV All. 17, Privy Council.

The expression used by Stuart, J., in I All. 311 in regard to the words “actual possession” is applicable with still more certainty to the words physical possession, by which is meant a personal and immediate possession.

See also authorities quoted under property incapable of physical possession.

The same view was taken under Act of 1859 in regard to the word “possession” in 2 W. R. 5 and S. D. A. N. W. P., 1866, vol. I, p. 181, and under Act X of 1871 by Stuart, J., in I All. 311; the opinion that such

possession as the property admitted of was sufficient was taken in H. C. R., N. W. P., 1868, p. 376, H. C. R. N. W. P., 1869, p. 9, 8 W. R. 225, I All. 311, All. 592, P. R. 46 of 1879, and 160 of 1879.

(2). The following properties are incapable of physical possession. If there is a registered deed then article 10 applies, limitation running from the date of registration, if there is none then, in cases of sale, where mutation has been effected, and in cases of foreclosure section 30 applies, and in cases of sale, where no mutation has been effected, article 120 applies.

(a).—The foreclosure of a share of an undivided *mahal*.

(i). P. R. 30 of 1892.

The limitation applicable to a suit for pre-emption of an undivided share, which does not admit of physical possession being taken, and in which the purchaser acquires his title by foreclosure proceedings under Registration XVII of 1906, and a subsequent suit for possession, there being no registered deed, is 6 years under article 120, Schedule II, article 10 having no application to such a state of facts.

(ii). IV All. 218 F. B.

Limitation is 6 years under article 120 in the case of a *baibilwafa* of a share of an undivided *mahal*.

A fractional share of an undivided *mahal* is incapable of physical possession.

(iii). V All. 187.

The limitation applicable to a suit to enforce the right of pre-emption in respect of a mortgage by conditional sale of a fractional share of an undivided *mahal* is that contained in article 120, Limitation Act of 1877

(iv). XXIV All. 17, Privy Council.

Where the property foreclosed was an undivided share in certain villages, held that the subject of the sale did not admit of physical possession.

(b).—The sale of a share in an undivided *mahal*.

(i). IV All. 24 F. B.

(ii). IV All. 179.

(iii). XX All. 315.

(iv). XX All. 375.

(v). XXIV All. 17, P. C.]

A sale of a share of an undivided *mahal* is not susceptible of physical possession in the meaning of article 10.

(vi). P. R. 87 of 1893.

An undivided share in a village does not permit of physical possession.

(c).—The foreclosure of a share in a joint *khata*.

P. R. 129 of 1906.

Physical possession of a share in a joint *khata* is not possible, so the limitation applicable to a suit to enforce a right of pre-emption in respect to a *baibilwafa* of a share in a joint *khata* (i. e., where there is no registered deed) is under article 120.

(d).—The sale of a share in a joint *khata*.

(i). P. R. 23 of 1882.

Where one-sixth of an undivided holding is sold, no fields being specified, the sale does not admit of physical possession, and the period of limitation must accordingly be calculated under article 10, Act XV of 1877, from the date when the instrument of sale was registered.

(ii). P. R. 61 of 1885.

In a suit for pre-emption it appeared the property sold consisted of an ascertained and definite share in a certain *khata*, together with a share in the *shamilat* and other manorial rights.

Held, the property sold was of such a nature that physical possession could not be taken of the whole of it.

(iii). P. R. 30 of 1892.

An undivided share in a joint holding does not admit of physical possession.

(iv). P. R. 14 of 1904.

The limitation applicable to a suit brought to declare a right of pre-emption in respect of a sale, not by registered instrument, of an undivided share in a joint holding, which does not admit of physical possession being taken, is under article 120.

(e).—The sale of property including share in *shamilat-deh*.

(i). P. R. 10 of 1881.

Where the property sold was a $\frac{1}{4}$ share of a well, and an undivided share of the common land, held the property did not admit of physical possession being taken.

(ii). P. R. 61 of 1885. *Vide* (d) (ii).

(iii). P. R. 65 of 1889.

In a suit for pre-emption held that where the sale in question includes a share in *shamilat*, even though the greater part of the property may consist of a separate holding, the whole subject-matter of the sale is not capable of physical possession, and the period of limitation is one year from the date of registration of the deed of sale.

(iv). 30 of 1893, C. A. 318 of 1897, P. R. 86 of 1902.

A share in *shamilat-deh* does not permit of physical possession.

(f).—A share in any undivided property.

P. R. 19 of 1898.

A share in joint undivided property is incapable of physical possession.

Contra as regards house property.

IV A. W. N. 317, VII A. W. N. 235.

Where the shares are well defined, *i. e.*, where each person owning a share has a special portion allotted to him for usage.

(g).—Property in the possession of a tenant, notwithstanding the fact that there has been attornment by the tenant and receipt of rents.

(i). P. R. 97 of 1880.

Where the vendee was previously the mortgagee out of possession, and after the sale the vendor's mother remained in possession of part, it being argued as a tenant, held an agreement to hold as a tenant would not be equivalent to a delivery of physical possession.

(ii). C. A. 227 of 1883, P. R. 48 of 1884.

Where property sold is at the time of the sale in possession of a tenant under lease from month to month or an unexpired term, the vendee cannot take physical possession under the sale in the sense of article 10, unless he takes such possession as will enable him to exercise complete physical control over the property. To constitute physical possession it is not sufficient that notice of sale be given to the tenant, and that the tenant accept the purchaser as landlord and agree to pay him the rent.

(iii). P. R. 73 of 1885.

Where the house in suit is simply a shop in sole possession of a third party as tenant, held that a house so occupied is not capable of physical possession.

Giving notice of the sale to the tenant and the acceptance by him of the purchaser as landlord do not constitute physical possession.

(iv). C. A. 318 of 1897

Land in the possession of occupancy tenants is incapable of physical possession.

(v). P. R. 16 of 1902.

A purchaser cannot be said to obtain physical possession so long as tenants remain in the house, even if they attorn to him and pay him rent.

(vi). P. R. 49 of 1908 F. B.

Where property sold is at the time of the sale in possession of a tenant the limitation applicable to a suit for pre-emption of such a sale is that provided by article 10, clause 2, as it does not admit of physical possession.

The words "capable of physical possession" should be construed with reference to the time of the sale.

P. R. 88 of 1905 overruled.

(vii). IV All. 24 F. B.

It seems to us it would be straining matters to hold that the receipt of profits would satisfy the expression "physical possession."

(viii). XX All. 315.

Constructive possession by receipt of rents from tenants is not physical possession in the meaning of article 10 and the owner of a house, who has let the house to a tenant, cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised premises.

(ix). XXIV All. 17, Privy Council.

Where property is in possession of tenants the physical possession is with them.

Contra :—

(i). P. R. 29 of 1878, 46 of 1879, 65 of 1883, with reference to the term "actual possession."

(ii). P. R. 88 of 1905.

Where property capable of physical possession in the occupation of a tenant is sold and possession is transferred to the purchaser merely by the tenants executing a lease in his favour, the limitation applicable is that prescribed in the first clause of article 10, and will not commence to run against the pre-emptor till the purchaser takes physical possession of the property purchased by him.

Overruled in 49 of 1908.

(iii). II All. 237.

The facts were that a deed of mortgage, dated 19th December 1876, without possession was executed by A in favour of T, terms of which were that A should remain in possession of his share, and pay interest on the mortgage-money annually to the mortgagee, who in default was empowered to sue for actual possession of the share.

On 19th May 1877, mutation was effected, and on 8th February 1878, a suit was filed by G for pre-emption giving 19th May 1877 as the date of cause of action. G asserted A was still in possession, while T asserted he had held possession since the deed.

Held, whether T had been in plenary possession of the share since the date of the execution of the deed and registration, or had only had such constructive or partial possession of it as was involved in the receipt of interest, plaintiff was equally bound under article 10 to have sued in one year.

Though, however, property in the possession of a tenant does not admit of physical possession, two rulings have held that physical possession can be obtained by and with the consent of the tenant by the exercise of some act of physical control.

(i). C. A. 227 of 1883.

Physical possession may be taken if the tenant allows it to be done by any act indicating that the purchaser has received physical possession over the property, *e. g.*, by marking out the boundaries of the land sold with a plough. Other acts of course may be sufficient to show that physical control of the property as owner has been given to the purchaser without interfering with the tenant's possession as tenant.

(ii). P. R. 48 of 1884.

When the property is in the possession of a tenant the purchaser cannot, in my opinion, exercise such control, unless with the consent of the tenant or, when the tenant does not consent, by evicting him.

If the purchaser and the vendor during the tenancy enter on the property, mark off the boundaries, and erect walls without objection by the tenant, they exercise physical control.

(h).—The sale of the equity of redemption, whether by voluntary sale or foreclosure to a mortgagee in possession.

(i). P. R. 160 of 1889.

Where in a suit for pre-emption it appeared that the property desired to be pre-empted had been purchased by the mortgagee in possession by an

unregistered deed of sale, held article 120, and not article 10, was applicable. The purchase was merely of the equity of redemption, an incorporeal right which did not admit of physical possession, and the deed was unregistered.

(ii). P. W. R., p. 11 of 1906.

(iii). IX All. 234.

In the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagees, it cannot be properly said that any property is sold which is capable of physical possession within the meaning of article 10.

An equity of redemption is not susceptible of possession of this description, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring this suit.

Contra :—

II All. 409.

In a suit for pre-emption where the property has been bought by a mortgagee in possession, held that the purchaser obtained physical possession under article 10 of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed, i.e., the date of payment of the purchase-money.

(i). The sale of the equity of redemption, while mortgagees other than the vendee are in possession.

(i). P. R. 62 of 1884.

Where the land sold was at the time of sale in the possession of a mortgagee with a right to retain possession until redeemed and, moreover, the mortgage could not be redeemed at the date of sale, but only at the close of the agricultural year, held the purchaser could not be put in physical possession of the land at the date of sale: that his purchase made him owner merely of the equity of redemption, an incorporeal right which did not admit of physical possession, though it put him in a position to obtain physical possession of the land when the mortgage was redeemed, and that limitation therefore began to run from the date of registration of the deed of sale.

(ii). P. R. 90 of 1886.

In a suit for pre-emption of a house it appeared the property in suit was purchased by two unregistered deeds for less than Rs. 100 each, that at the time the house was in possession of mortgagees from whom, after long litigation, the vendees got possession in execution, whereon the present suit was filed.

Held, the present suit brought three years after sale was not time-barred, because all the owners could sell at the time was the equity of redemption, an incorporeal right not capable of physical possession, and that, as the purchasers could not acquire physical possession at the time of sale and the deed was not registered, article 120, and not article 10, governed the case.

(iii). C. A 318 of 1897.

Land in the possession of mortgagees is incapable of physical possession.

(iv). P. R. 45 of 1895.

Where property sold is at sale in the possession of a third person as mortgagee, the mortgage not being redeemable for three years, it is incapable of physical possession.

(v). C. A. 584 of 1888.

Quotes 160 of 1889 with approval.

(vi). V N. W. P. 177 and XII A. W. N. 77 ditto.

(vii). Stuart, C. J., in I All. 311 F. B.

Where a mortgagee is in possession at the time of the sale, the purchaser cannot take actual possession till the mortgage term has expired.

(viii). P. R. 30 of 1911.

The subject of sale did not admit of physical possession at the time of sale as it was in mortgage and part of the sale money was left with the vendees to redeem the land.

Contra with reference to the term "actual possession."

I All. 311.

And with reference to the term "possession."

H. C. R. N. W. P. 1868, p. 367.

(3). The term "physical possession" must be construed with reference to the time of the sale.

(i). P. R. 68 of 1884.

In a suit for pre-emption it was contended by the defendant that the plaintiff's case was barred by limitation, the property, being a share in an undivided holding and including rights in the common land, did not admit of physical possession.

It was alleged in reply that the whole of the common land had already been divided, and that, though the sale was nominally of one-third share of the holding, the vendor's share had, as a matter of fact, been separated off and was in his exclusive possession before the sale, and that this was the subject of the sale.

Held that, if the above allegations were correct, the circumstance that the land was still recorded as an undivided holding would be no obstacle to the purchaser getting physical possession of the whole of the property sold.

(ii). P. R. 87 of 1893.

Three persons mortgaged a share of their joint holding by way of conditional sale, which the mortgagor foreclosed. It was urged that subsequent to the mortgage and before foreclosure the mortgagors partitioned among themselves and that, after the foreclosure decree, they handed over their several shares to the mortgagee. Held, that this partition, even if effected, did not affect the case. A partition after sale will not make property separate (and therefore capable of physical possession) which was joint at the time of the sale.

(iii). P. R. 49 of 1908 F. B., see p. 381.

Contra :—

P. R. 88 of 1905, see p. 382.

(4). Registration.

(a). A sale certificate granted by Court is not a registered document.

P. R. 142 of 1908.

A sale certificate granted by a Court under section 316, C. C. P., of which a copy has been forwarded to the Registering Officer in accordance with section 89, Registration Act, 1877, and duly filed in the register of non-testamentary documents relating to immoveable property prescribed in section 51 of the Act, is not a registered document within the meaning of article 10, Limitation Act.

(b). Registration is complete when copied in the registration book, and not when the document is presented for registration.

(i). P. R. 10 of 1881.

A deed is not registered simply by presentation, it is registered when copied in the registration book and endorsed with a certificate of registration, from which date time runs.

(ii). P. R. 92 of 1906.

The period of limitation prescribed by article 10 in case the property does not permit of physical possession runs from the date of registration, and not the date of presentation for registration.

(5). Applicability of article 10.

(a). We have already seen the transactions to which article 10 applies.

One point requires notice, and that is, that it applies equally to foreclosures as to sales, when the other conditions of article 10, *viz.*, that the property is capable of physical possession and such has been taken or, if not so capable, a registered deed has been executed.

For some time it was held that the word "sale" in article 10 did not include "foreclosures", but it is now definitely provided that foreclosures are covered by the term.

It will suffice to mention the rulings.

P. R. 87 of 1893, P. R. 76 of 1895, III All. 175, III All. 610 F. B., IV All. 291, XX All. 315 F. B., XXIV All 17, Privy Council, 2 W. R. 5, XIV Cal. 761.

Contra :—

P. R. 103 of 1885, P. R. 37 of 1894, C. A. 66 of 1906, III All. 610, Straight, J., IV All. 218 F. B., IV All. 414, VIII All. 54, V All. 187, XIV All. 405 and XX All. 375.

(b). If the subject-matter does not admit of physical possession but a registered deed has been executed, time runs from the date of registration of the deed.

P. R. 10 of 1881, P. R. 156 of 1882, C. A. 1052 of 1880, 61 of 1885, IV All. 24 F. B., and IV All. 179.

(c). If the subject-matter does admit of physical possession, and the whole of it has been so possessed, time runs from the date of such possession, and, where possession of the whole has been taken in parts, from the date of the taking possession of the last part.

P. R. 98 of 1876.

(d). If the other conditions of article 10 are not complied with, *i.e.*, if the property does not admit of physical possession or physical possession of the whole has not been taken, or there is no registered deed, then article 120, or section 30 as the case may be, applies.

P. R. 97 of 1880, P. R. 90 of 1886, C. A. 318 of 1897, 30 of 1893, XX All. 315, XXIV All. 17, Privy Council, and C. A. 1066 of 1907.

(e). According to one ruling article 10, part 2 applies only to a sale which is on the face of the deed a sale.

XXVII All. 540.

The second provision in the third column of article 10 refers to an instrument which is not only in reality but in terms an instrument of sale. The instrument in the present case was certainly on the face of it not an instrument of sale. I am of opinion therefore that the second provision in the article is not applicable to this case, and would hold it was in time within article 120.

I doubt the applicability of this rule in the Punjab as it is not the terms of the document but the nature of the transaction which has to be considered and a nominal gift or mortgage can be construed to be a sale.

6. Date for computation of limitation in cases of foreclosure.

(1). The first point to ascertain is when the foreclosure becomes absolute.

In X Moo. I. A. 340, P. C., it was held :—

The general effect of these Regulations is that, if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd July 1813, No 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession or to obtain a declaration of his absolute title, if he is in possession.

But this ruling has been interpreted in III All. 770 to mean, not that the title is not absolute at the expiry of the year of grace, which is the real date when the title does become absolute, but that the remedy of the mortgagor to recover, if he can show he is entitled to recover, is not barred until a suit has been brought by the mortgagee.

III All. 770.

The first Court on the authority of X Moo. I. A. 340, held, that the mortgagee's title was not complete at the end of the year of grace, but he had to bring a regular suit for possession if out of possession, or to obtain a declaration of his title if in possession.

Held, the Judge has misapprehended the decision. The proceedings under the Regulation in regard to these mortgages are purely ministerial it is true, and the mortgagee is left to a regular suit if out of possession, to recover possession, or to obtain a declaration of his absolute title if he is in possession. When such a suit is brought the mortgagor may contest the validity of the conditional sale, the regularity of the foreclosure proceedings, and may show that nothing was due. But the issue will be so far as the right of redemption is effected, whether the necessary deposit has been made, if at the end of the year of grace anything was due to the mortgagee.

If the mortgagor fails to establish this case, the right of redemption is gone. But a decree in favour of the mortgagee does not create his title as owner. It establishes, as a matter beyond all further question, that as between the mortgagor and mortgagee the ownership has passed entirely from the former to the latter. But the title of the mortgagee was created by the failure of the mortgagor to redeem within the year of grace and dates from the end of that year.

The foreclosure, therefore, becomes absolute on the expiry of the year of grace. This view has also been taken in the following rulings:—

(i). N. W. P. H. C. R. 1865, p. 103.

It is not necessary for a conditional mortgagee, if he is in possession, to bring a suit to complete his title.

(ii). N. W. P. H. C. R. 1868, p. 358.

The right of a conditional purchaser, who has duly taken the proceedings directed by the Regulation, becomes absolute on the termination of those proceedings and this notwithstanding he may not proceed by suit to vindicate his right until a later period.

Though it be well-settled law that a conditional purchaser, if out of possession, can obtain possession if he is resisted only by regular suit, and that if in possession he can vindicate his title, if impugned, only by regular suit, we at the same time hold that in any such suit his right, if established by proof, must be referred to the period at which the proceedings under the Regulation came to an end, and must be held to have become absolute at that date.

(iii). X N. W. P. S. D. A. Rep. 588.

The proceedings of the Civil Court in the matter of foreclosure were purely ministerial, not judicial: no authoritative enforcement of the sale

was made by the Civil Court, the sale became absolute solely 'in consequence of the omission of the vendor to deposit the amount under the deed of conditional sale within the year of grace, agreeably to the notification issued by the Judge at the instance of the mortgagee under the provisions of section 8, Regulation XVII of 1906.

(iv). III All. 510 F. B.

The result is that the title as owner of the mortgagee begins when the right of redemption has gone. It is not created by any compulsory decree of Court, though the law requires that it should be completed by a suit, in which any question as between the mortgagor and mortgagee is set at rest for ever.

If the property be not redeemed within one year from the date of the notification required after petition has been presented, the mortgage is finally foreclosed and the conditional sale becomes conclusive, and the title of the mortgagee as owner dates from the end of the year within which the mortgagor may redeem.

(v). VI All. 344.

On the expiration of the year of grace allowed by Regulation XVII of 1906, the ownership of the mortgaged property vests absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right.

(vi). XI All. 164.

The ownership of mortgaged property vests in a conditional vendee on the expiration of the year of grace, even though he might not have obtained a decree establishing or declaring his title.

(vii). XIV All. 405 F. B.

The title of the conditional vendee became absolute on the expiration of the year of grace.

(viii). XXIV All. 17 P. C.

The period when the right of the mortgagee becomes mature is the expiration of the year of grace: the mere fact that he has not enforced that right by a suit for possession is immaterial.

But—

(a) The foreclosure proceedings must have been valid, and the mere fact of a decree having been passed is not even *primâ facie* evidence of the validity of such proceedings.

XI All. 164.

The mortgagee under a deed of conditional sale executed in 1878 took foreclosure proceedings under Regulation XVII of 1806, and the year of grace having expired, a foreclosure proceeding was recorded on 18th September 1892 declaring the mortgagee to have foreclosed. In August 1885 the mortgagee instituted a suit for possession of the mortgaged property. On 19th September 1885 the suit was compromised, the mortgagee accepting a part of the mortgaged property and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently a suit for pre-emption was brought

against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. Plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of 19th September 1885.

Held,.....foreclosure proceedings under the Regulation being of a purely ministerial character were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure has been duly effected: that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure, and that in the present case, as the plaintiff had not asserted or attempted to prove all those requirements had been fulfilled so as to result in an actual foreclosure, and consequent accrual of pre-emption, no foreclosure was shown to have taken place prior to the compromise of 19th September 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date.

(b). Where the foreclosure proceedings have been compromised, the foreclosure cannot be said to have been completed and the title become absolute, and the compromise, therefore, becomes the cause of action.

(i). XI All. 164, see (a) *supra*

(ii). P. R. 30 of 1892.

The land was mortgaged in 1873 by way of conditional sale. In 1883 proceedings for foreclosure were taken, and when the year of grace expired, a suit for possession was brought, which ended on 17th July 1884 in a consent decree, under which the sale was not to be considered absolute for the further period of four years. Held, the sale failed to become complete till 18th July 1888.

(iii). C. A. 1273 of 1896.

Follows P. R. 30 of 1892.

(2). In cases of conditional sales covered by section 30 (2), Pre-emption Act, it is expressly laid down that the period of limitation begins to run from the date on which the title of the mortgagee to the property becomes absolute, that is on the expiry of the year of grace.

This law applies, as is clear from the section, to the cases formerly covered by article 120, and it reproduces the best opinions as to the interpretation of the words "when the right to sue accrues" in article 120.

It will suffice to note the former rulings here.

P. W. R. 4 of 1907; P. R. 103 of 1901 F.B.; P. R. 129 of 1906; XV N.W.P., S. D. A., p. 262; N.W.P. H. C. R. 1870, p. 284; 6 W. R. 116; 7 W. R. 428; III All. 610; Straight, J.; III All. 770; XI All. 164; XIV All. 405 F. B.; XX All. 315 F. B.; and XXIV All. 17 P. C.

The following rulings held that limitation ran from the date of the decree in favour of the foreclosing mortgagee :—

P. R. 82 of 1880, IV All. 414 and VIII All. 54.

and this date still exists where the foreclosure is under the Transfer of Property Act, a circumstance inapplicable to the Punjab (*vide* XX All. 358 and XX All. 375).

In I All. 592 where the property did not admit of physical possession, the date of computation was given as such date as the conditional vendee got such possession as the property was capable of.

(3). Under article 10 two dates are given (which apply equally to foreclosures as to sales) from which the period of limitation has to be computed, *viz.*, the date on which physical possession of the whole of the property has been taken, or the date of registration when the instrument of sale is registered.

The instrument of sale here does not mean the instrument of mortgage, for where the law does not permit of pre-emption of mortgages, there is no cause of action at all at the time the deed is executed. Foreclosures are never effected by registered deed, and so the only date for computing under article 10 in respect to foreclosures is the date physical possession is obtained.

The term "when the sale becomes absolute," *i.e.*, the expiry of the year of grace has no place in article 10, but applies only to cases falling under section 30 (2).

The result, therefore, is that where there is a foreclosure of a mortgage, which at the time of foreclosure, *viz.*, the expiry of the year of grace, admits of physical possession and of the whole of which physical possession is taken, limitation begins to run from the date on which such possession is taken, whereas when the property does not admit of physical possession, time begins to run under section 30 immediately on the expiry of the year of grace.

Authorities that where the property admits of physical possession at the time of the foreclosure becoming absolute, limitation runs from the date on which physical possession of the whole is taken :—

N. W. P. H. C. R. 1867, p. 364 ; II All. 884, Spankie, J. ; III All. 175 ; III All. 610, Stuart, C. J. ; and IV All. 291.

It is interesting to note here that where the right of pre-empting mortgages existed, the pre-emptor was in the following cases held to have the right to pre-empt dated both from the execution of the deed of conditional sale and from the date the sale became absolute :—

10 N. W. P. S. D. A., p. 588 ; 14 N. W. P. S. D. A., p. 262 ; III All. 610 F. B. ; V All. 157 ; VII All. 478 ; XXVII All. 12.

while in the following cases the date of the execution of the conditional sale-deed was given as the sole date :—

II All. 884, III All. 610. Pearson, J.

On the other hand, in the following it was held, that there was no cause of action on the deed itself, but only when the sale became absolute :—

N. W. P. S. D. A., 1862, vol. II, p. 175 ; 2 W. R. 215 ; III All. 175 ; P. R. 11 of 1901.

V All. 187 gave four possible dates in such cases, *viz.*, on the execution of the mortgage, on redemption during the year of grace, after issue of the notice of foreclosure, and after the sale becomes absolute.

All these rulings are, however, only of academical interest now.

So far as cases falling under section 30 (2) are concerned, the law is statutory and limitation dates from the time the sale becomes absolute, and, so far as cases falling under article 10 are concerned, time runs from the date on which physical possession of the whole of the property is taken.

7. The *terminus a quo* in cases of sales requiring sanction of the Deputy Commissioner is the date of sanction not of mutation.

P. R. 82 of 1912.

For the purposes of a pre-emption suit, in respect of a sale which requires the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act, limitation starts from the date on which sanction is given and not from the date of mutation.

This rule is now inapplicable under the Act of 1913 as such sales are no longer pre-emptible.

8. We have now to note certain miscellaneous points.

(1). Where a rival pre-emptor is impleaded, article 120 is applicable and not article 10. Under the present Act also article 120 and not section 30 is applicable. Consequently a suit brought within time as against a vendee and vendor will not be barred by impleading a rival pre-emptor until six years have elapsed.

(i). VII All. 167.

Two suits to enforce the right to pre-empt in respect of a particular sale having been instituted, plaintiff in one was added as defendant to the other first instituted.

Held, that as regards him, the second suit instituted a claim by one pre-emptor against another for the determination of the question, whether plaintiff or defendant had the better right to pre-empt the property, a claim essentially declaratory in its nature and governed by article 120, there being no specific provision for such a claim in the Limitation Act, and the right to sue accrued when the first suit was instituted.

(ii). P. R. 11 of 1893.

On 11th June 1889 S. sold to Haku and others. On 10th June 1890 M. X. sued the vendor and vendee and on 7th July 1890 Hamira and others instituted a similar suit, plaintiffs being cross-impleaded on 6th August 1890. On 16th October 1890 Hamira withdrew on the ground that the land had been resold to him in recognition of his pre-emptive right.

Held, that as regards Hamira and others, the suit must be deemed to have been instituted when they were made parties (6th August 1890), but the provision applicable was not article 10 but article 120.

The suit against Hamira did not seek to enforce any right of pre-emption as against him, but merely to establish that he had no right of pre-emption superior to that of plaintiff, and to bind him by the decree eventually to be passed in favour of the plaintiff if he succeeded in establishing his right against the other defendants, and further caused it to appear that Hamira had no superior right to which the Court could be asked to give effect.

(iii). C. A. 1199 of 1899. Ditto.

(iv). P. R. 25 of 1899.

As against a rival pre-emptor who has sued and has been impleaded as a co-defendant the cause of action arises on the institution of that pre-emptor's suit, and the suit against him is not barred after the expiry of the period for a suit against the original purchaser which was within time. Article 120 is applicable in such a case.

(v). P. R. 20 of 1908.

As between rival pre-emptors article 120 applies and not article 10, therefore one pre-emptor can be impleaded as co-defendant in the suit of the other in the period given in article 120.

(vi). P. R. 80 of 1912, as P. R. 20 of 1908.

(2). Effect of impleading subsequent vendee on limitation.

(a). Where the first vendee reconveys to a second *ante litem* it was formerly held that the latter had to be impleaded as a party within the period prescribed by article 10.

The old authorities have now been overruled, and the law as now laid down is that article 120 governs such a case.

(i). P. W. R. 28 of 1913.

Where, in a suit for pre-emption instituted within limitation against the original vendee, a transferee *ante litem* from him is added as a defendant after limitation has expired as against the original vendee, the claim as against the transferee is governed not by article 10, but by article 120, and the starting point of limitation is the date of the transfer made by the original vendee in favour of the transferee.

Article 10 applies only to a suit against the original purchaser under the sale sought to be impeached, and takes no cognizance of the second vendee to whom the subject of the first sale has been subsequently transferred.

(ii). IX A. L. J. 211.

Contra :—

(i). C. A. 456 of 1901.

Where the vendee transfers his bargain to a pre-emptor with inferior rights to claimant, and the second vendee is impleaded as a party, article 10, and not article 120, governs the case.

(ii). P. R. 25 of 1903.

On 4th March 1898 G. sold the land in suit to F., the deed was attested as a witness by J., lambardar of the village. On 24th February 1899 N. sued to pre-empt. On 13th March 1899 vendee F. said he had sold the land on 23rd January 1899 to J. J was then impleaded and he pleaded limitation.

Held, as plaintiff, in order to succeed against J, if his purchase were a genuine one had to seek to enforce his right of pre-emption against him article,

10 Limitation Act, being applicable, though the suit against F. was in time, J. having been added three days after the period allowed, the suit should be held barred unless C. could show the sale to J. was fictitious.

(iii). C. A. 372 of 1905.

A. bought land and exchanged it with B. A. was sued by C. for pre-emption and got a decree, C. being unable to obtain possession of the land transferred to B. sued B. for possession.

Held, the suit must be regarded as one for pre-emption and not having been filed within the period of limitation prescribed, must, therefore, be dismissed as barred by limitation.

(iv). P. R. 84 of 1911.

Where, previous to the institution of a suit for pre-emption, the vendee has resold to another person and the latter is not made a party to the suit until after the expiration of the period of limitation, the suit is barred.

(b). Where the second vendee bought after suit, the doctrine of *lis pendens* applies, and it is immaterial when the second vendee is impleaded.

P. R. 3 of 1907.

Plaintiff brought an action to enforce a right of pre-emption within the period of limitation prescribed by law. Defendant, the vendee, assigned over his interest to a third party after the institution of the suit. Then plaintiff applied to implead him after limitation, and the Court ordered him to be impleaded, and limitation was then pleaded.

Held, the suit was not barred by limitation in consequence of the joinder of the assignee. Section 22 Limitation Act does not apply when the original suit is continued against an added defendant who derives his title from the original defendant by an assignment pending suit.

(c). Where there are two vendees, and one alienates to a new vendee his portion, such portion being divisible, a suit to recover the portion sold to one of the original vendees will not be time-barred by reason of limitation having expired with respect to the portion resold.

P. R. 6 of 1909.

On 18th October 1900 B. and C. bought certain land in the proportion of two-thirds and one-third, the price paid by them being fully specified in the deed of sale. Plaintiff brought an action against both vendees to enforce pre-emption in respect of the whole sale. It being proved C. had assigned his interest over to a third party long before the institution of the suit, the Court, on plaintiff's application after the period of limitation had expired, ordered the new assignee to be impleaded as a co-defendant. Thereon the defence pleaded limitation. The Court allowed the plea in favour of the assignee, but decreed the suit for two-thirds of the claim against B. The latter appealed on the ground that a part of the claim being dismissed as barred by limitation, the whole suit ought to have been dismissed as barred.

Held, the price and shares being distinctly specified, the sale was divisible, and plaintiff was not debarred from claiming the two-third share sold to B. by reason of the dismissal of the suit in respect to the one-third share sold to C.

(3). Effect of impleading joint-vendee after limitation.

The impleading of a co-vendee after limitation bars the suit as against all.

IV All. 145.

Plaintiff on 12th April 1880 instituted a suit against Z. claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother A. jointly under an instrument, dated 12th April 1879. On 3rd May 1880 A. was made a defendant to such suit, Z. being appointed guardian *ad litem* for him.

Held, that inasmuch as the suit as regards A. was beyond time, and as the only relief which could be granted therein to P. was the invalidation of the joint sale to Z. and A, such suit, even admitting it was within time as regards Z, was not maintainable.

But where the alleged joint-vendee does not appear in the deed of sale, as he is not a necessary party, limitation does not run against the plaintiff on his being impleaded.

P. R. 108 of 1895.

It is clear that the vendees whose names were entered in the deed of sale were alone the parties who need have been impleaded as defendants...the other defendants who purchased through them were not necessary parties, and it is, therefore, immaterial when they were brought on the record.

(4). Effect of impleading one representative of vendee after limitation.

In such a case the suit is barred as against all.

(i). P. R. 104 of 1882.

Where the legal representative of a co-vendee, who died before the litigation commenced, was impleaded as co-defendant after limitation, held, as the subject matter of a pre-emption suit, when the property sold is one and subject to the same right of pre-emption, being one and indivisible, and it being necessary that the suit should either be decreed or dismissed as a whole, it was not competent to the Court to decree a part of the claim as against one of the purchasers and dismiss the rest of the claim as against the other.

(ii). P. R. 66 of 1896.

Where one representative of a deceased vendee is impleaded after limitation, the claim being barred against him is barred against the other defendants also.

(5). Effect of impleading the vendor or his representative after limitation.

Being an unnecessary party, the fact does not affect the case.

(i). P. R. 134 of 1889.

Where the sons of a vendor are impleaded after limitation, inasmuch as they were not necessary parties, their impleading after time will not bar the suit as against the vendee.

(ii). P. R. 94 of 1902.

The vendor not being a necessary party, the non-impleading of his heirs for six months after his death will not cause the suit to abate as against the vendee.

(6). Statements as to delivery of possession in deeds are of little value.

P. R. 20 of 1881.

Statements in deeds of sale as to delivery of possession are so often made as a matter of form that it is impossible to rely upon such statements, unsupported by any evidence, as proof of a fact necessary to establish a plea of limitation:

(7). Where a suit is time-barred, but no notice of the sale has been given by the vendee, the vendee should not be awarded costs.

P. R. 32 of 1881.

The vendee was refused costs in a claim dismissed as time-barred, because he did not give the pre-emptors notice or get mutation effected.

(8). Limitation for execution of decree for pre-emption runs from the date of payment of price.

XXIV All. 300.

Article 179 of Limitation Act of 1877 applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution until the decreeholder pays into Court the pre-emption-money. The first application, therefore, for execution of such a decree will be governed not by article 179 but by article 178 and limitation commences to run against the decreeholder from the time when the pre-emption price is paid, and not from the date of the order in favour of pre-emption.

But see P. W. R. 87 of 1909.

(9). Article 144 has no application to suits to pre-empt.

XXIV All. 17, Privy Council.

Claims to pre-emption are specially considered in article 10 and though the particular claim in the present case did not for certain reasons fall within it, that did not affect the construction of article 144 as illustrated by article 10.

A claim to enforce a right of pre-emption is, as the latter article shows, a claim impeaching another's right, and its primary object is to set aside the competing right. The circumstance that the plaintiff in the present case inverted the proper order and, instead of first asking for the setting aside and then asking for possession as the consequence, had asked for possession by setting aside, could not alter the nature of the section.

9. Fraud on the pre-emptor.

(1). Section 18, Limitation Act, which runs :—

"When any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right or of the title on which it

is founded or where any document necessary to establish such right has been fraudulently concealed from him; the time limited for instituting a suit.....

- (a) against the person guilty of the fraud or accessory thereto, or
- (b) against any person claiming through him, otherwise than in good faith, and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or in the case of the concealed document, when he first had the means of producing it or compelling its production, is one which is constantly relied on in pre-emption cases to give a fresh period of limitation.

It must be remembered that it is not fraud to defeat the law of pre-emption by every legitimate means, and this fact should be borne in mind in determining whether there has been fraud or not.

It should also be borne in mind that mere vague allegations of fraud are inadmissible,—the fraud relied on must be specifically pleaded and proved.

Many facts of a doubtful character arise, but they are not in themselves sufficient to prove fraud.

So far as the law of pre-emption is concerned, it is advisable to note the rulings bearing on fraud.

(2). It has been held that the following are not acts amounting to fraud :—

(a). Secret registration of the deed at a distant place, coupled with other facts mentioned :—

(i). P. R. 32 of 1881.

Registration at a registry office five or six miles off, one witness being a non-agricultural resident of the parties' village, the other a Syad well-known to the parties, no mutation being effected.

(ii), C. A. 807 of 1901.

Deed registered at a village a few miles from the site. No notice, mutation delayed for five years. The vendee after sale and before mutation obtained possession of occupancy rights mortgaged to him by the occupancy tenants; no active concealment: the vendee allowed the lambardar to recover fees from the vendor.

(iii). P. R. 16 of 1902.

The fact that a sale-deed of house property in Bhiwani was registered at Bombay, where the parties were carrying on business and that for some time vendees had not obtained physical possession of the property as it did not admit of such, tenants being in at the time, did not establish fraudulent concealment.

The fact that a document is executed and registered goes against the theory of concealment, as there is no absolute necessity to execute a deed of sale.

In the following case secret registration, coupled with other facts, was held to constitute fraud :—

P. R. 12 of 1898.

A deed of sale, dated 12th December 1876, purported to be a mortgage deed and was registered on the same date at a tahsil three or four miles off, the marginal witnesses being residents of other villages.

From 1876 to 1895 the vendee was recorded as a tenant as before, and on 19th September 1894 a *patwari* reported a sale had been effected and that the vendee was in possession, and on 1st October 1895 mutation was effected, the residents of the village being unaware of the sale.

In 1881, on the death of the vendor, his son had been recorded as owner.

Held, the concurrence of all these facts, though each by itself might be merely suspicious, proved fraudulent concealment, and as there was no proof plaintiff knew till 1st October 1895 limitation ran from that date.

(b). Omission to give notice.

(i). P. R. 29 of 1878.

Omission to give notice is not concealment amounting to fraud, and where, as in this case (an oral sale followed by constructive possession through attornment of tenants), there is no outward and visible sign of a change of possession, a pre-emptor may have difficulty in ascertaining that a cause of action has accrued to him, still where the sale or the change of possession under the sale has not been concealed from the pre-emptor by means of fraud, limitation runs from the date of the purchaser's taking possession of the property, even though the pre-emptor may not have known of the sale or of the change of possession under the sale.

(Note.—This ruling is applicable if we read “physical possession” for “possession.”)

(ii). P. R. 46 of 1879.

When a sale of land subject to the right of pre-emption is made without previous notice to the pre-emptor, if the vendor and vendee intentionally conceal the fact of sale, the pre-emptor is kept from the knowledge of his right to sue by a fraud of which the vendor and vendee are alike guilty, but the mere omission by a vendee to give due notice to a pre-emptor of a proposed sale is not a fraud even if the omission is intentional.

(iii). P. R. 32 of 1881.

Where plaintiff's claim was barred by limitation unless he could establish fraud.....*held*, that the fact that the sale was not notified was not sufficient to bring the claim within limitation, but it must be shown there was an industrious and artful concealment of the fact of sale, and the facts must lead necessarily to the inference that there was a design to keep the pre-emptor in the dark.

(iv). P. R. 120 of 1883.

A conveyance of *maurusi* rights was made on 31st August 1887 to a tenant-at-will. The vendor died and on 8th October 1879 mutation was applied for and the deed was then produced, and on 9th February 1880 a suit to pre-empt was filed. The Lower Court held that as no notice had been given, limitation ran from 8th October 1879 when the plaintiffs heard of the fraud.

Held, that omission to give notice to the pre-emptors does not amount to keeping the plaintiffs from a knowledge of their rights by fraud, and therefore section 18 did not apply, because the deed was duly registered and nothing indicating a design to deceive the pre-emptors was alleged in the plaint or first appeal.

(v). P. W. R. 130 of 1911.

(c). Delay in effecting mutation.

P. R. 46 of 1879.

Delay in effecting mutation is but weak evidence of a design to conceal the fact of sale.

See also *supra* P. R. 92 of 1881, C. A. 806 of 1901, P. R. 120 of 1883 and contrast P. R. 12 of 1898.

(d). Mere silence. To constitute fraud there must be active misrepresentation.

(i). P. R. 32 of 1881 (b) (iii) *supra*.

(ii). P. R. 3 of 1882.

In a suit for two plots of land, which was admittedly barred by limitation as to the first plot sold unless saved by section 18, the finding of the Lower Court was to the effect that the evidence proved that the fact of the sale of the first plot had been kept secret from the plaintiff, that the purchaser was already in possession of the land as mortgagee and up to the time of the second plot had represented himself as holding only as a mortgagee.

Held, that this finding was not sufficient to sustain the decision that the suit was brought within time, because it did not find that the representation of the defendant was made by him in order that the pre-emptor might be kept from the knowledge of his right of action, and that the plaintiff was kept from such knowledge by this representation.

(iii). P. R. 23 of 1882.

Where the plaintiff has all along been in possession of the land in suit and was unaware of the original sale, unless it be shown that he was fraudulently kept from knowledge of his rights, it would not affect the case.

(iv). P. R. 73 of 1885.

If a suit is time-barred, it can only be revived if it be shown that knowledge of the sale was withheld by fraud. Mere silence on the part of the vendor is not fraud. To prove fraud there must be some distinct act done with the intention of deceiving the pre-emptor or concealing the fact of the sale.

(v). P. R. 86 of 1902.

The expression "by means of fraud" in section 18 means an active deceit in defrauding or endeavouring to defraud a person of his rights by some artful device, therefore where the vendor and the vendee had, by their acts of omission or commission, in point of fact kept the pre-emptor from the knowledge of the sale, but were able to prove neither of them had any intention to fraudulently conceal the sale from the pre-emptor and were able

to give a reasonable explanation of their conduct and the acts alleged to constitute fraud, held, the pre-emptor was under the circumstances not entitled to the benefit of section 18.

(vi). P. W. R. 130 of 1911.

(e). Non-registration of a deed not requiring registration.

P. W. R. 130 of 1911.

(f). Attestation of deed by one witness only.

P. W. R. 130 of 1911.

(g). The detailed facts in the following cases :—

(i). P. R. 46 of 1879.

In 1872 the entire property was under mortgage, half to K. S. and half to D. D. D. D.'s was redeemed, and two-thirds of a well sold to K. S. and S. S. by deed executed on 23rd August 1872 and registered on 24th August 1872. The witnesses to the deed, two in number were of strange villages, one of them J. K. being *mukhtar* of the vendors, and they were also the identifying witnesses at registration.

The remaining one-third share in the well was sold by deed in July 1874, registered same date, the witnesses to both the deed and registration being J. K. and a stranger.

The yearly papers showed as cultivators K., and A., and K. C., son of D. D., and for succeeding years K. and A. K. C. lost possession in 1872 and K. and A. from that time paid rent to defendants.

No visible change of possession took place except that K. C. ceased to cultivate. Plaintiff did not become aware of either sale until mutation in July 1876, whereupon he instituted the present suit.

Held, on the above facts, it was not shown the plaintiff was kept from knowledge of his right to sue by means of fraud.

(ii). P. R. 3 of 1882.

(a). The vendee after date had accompanied the *patwari* during *girdawari* and caused himself as herebefore to be entered as mortgagee instead of as purchaser, and did this in order to keep off pre-emptors.

(b). A witness to the deed of sale and vendor deposed the vendor had told them to keep the sale a secret.

(iii). P. R. 91 of 1893.

(a). The vendee was in possession as mortgagee.

(b). The witnesses to the deed were Hindus and, were not taken before the Sub-Registrar, whereas the parties to the deed were Mussalmans.

(c). The vendor admitted he agreed with the vendee to conceal the sale so as to ward off pre-emptors.

(d). The plaintiff had no knowledge of the sale.

(e). There was great delay in applying for mutation, and, even after the application, proceedings were kept pending suspiciously for 18 months.

(iv). P. R. 86 of 1902.

(a). The transferee lived elsewhere.

(b). There was no mutation or change of possession.

(c). In several subsequent suits the transferor gave himself out as owner and issued notices of ejectment to tenants, and had afterwards mortgaged the property as his own.

(d). No one in the village was aware of the transfer.

(e). The deed contained a wrong entry.

(f). The transferor had, after transfer, exchanged some of the land with another person.

An explanation was furnished to the effect that the transferee was a *parda-nashin* and the transferor, her husband, managed for her.

(v). P. W. R. 180 of 1911.

(a). Omission to give notice.

(b). Connection between vendors and vendees.

(c). Small number of interested attesting witnesses.

(d). Stamp paper not bought from licensed vendor.

(e). Deeds not registered, registration being optional.

(f). Vendees not parties to partition of *shamilat*.

(g). Mutations not effected till very late.

(3). Fraud may be proved by positive misstatements.

P. R. 73 of 1885.

Telling a pre-emptor that a sale was a mortgage might be fraud.

(4). The fraud must be proved to have occurred within the period of limitation, *i.e.*, fraud practised at a time subsequent to the claim becoming time-barred would not affect matters.

(i). P. R. 3 of 1882.

It is necessary to find that the fraud was committed while the plaintiff still had a right to institute the suit, *i.e.*, within one year from the registration of the deed of sale, and also that the suit was brought within one year of the discovery of the fraud.

(ii). P. R. 73 of 1885.

It must be proved that the fraud took place within a year from the date of limitation.

(iii). P. R. 91 of 1893.

To bring a suit within section 18, it is necessary for the plaintiff relying on it to prove that the fraud was committed while he still had a right to institute the suit.

(iv). P. R. 86 of 1902.

The fraudulent act which kept plaintiff from the knowledge of the transfer must, in order to extend the period of limitation, be one which occurred while plaintiff had a right to institute the suit.

(v). XVII Bom. 341 Privy Council.

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought.

If fraud, however, was practised within such period, it rests on the vendee to show that the pre-emptor's want of knowledge was not caused thereby, and that he acquired knowledge more than a year before suit.

(i). XVII Bom. 341, P. C. *vide supra*. p. 400.

(ii). P. R. 12 of 1898.

Where fraudulent concealment is established, it rests on the vendee to prove that the pre-emptor had knowledge of the sale more than one year before suit.

(iii). P. R. 34 of 1904.

Where an original transaction is tainted with fraud, it lies on the party against whom fraud is found to prove that the want of knowledge was not caused by fraud, or that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation allowed.

(iv). XXVII All. 546.

On 11th September 1901 G. executed in favour of M. what purported to be a deed of gift of certain property. M. after an unsuccessful attempt to obtain mutation of names, filed a suit for declaration that the transaction was a gift and for possession of the property, but stated he was willing to pay the balance of the consideration-money if it was found to be a sale.

On 12th December 1902 a consent decree was passed, whereby the deed of gift was declared lawful and possession was decreed in favour of M.

On 5th February 1903 S. sued to pre-empt against D. and M. alleging the transaction was a sale fraudulently disguised as a gift, and that he learnt of the fraud on 14th December 1902.

Held, the suit was in time. It lay on the defendant to show the plaintiff had knowledge of the fraud at a time which was too remote to allow him to bring the suit, and this he had failed to do.

(v). XXX Cal. 539 Privy Council.

As XVII Bom. 341.

(5). Where fraud has been practised by active concealment of the real purchaser in a *benami* transaction, it has been held in,

P. R. 89 of 1911.

That section 18, Limitation Act applied, the suit being against the person guilty of the fraud, and that it was immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the plaintiff.

10. Section 17 of the Limitation Act expressly excludes its operation in cases to enforce the rights of pre-emption.

11. Section 7 of the Limitation Act also expressly excludes its applicability to suits for pre-emption, though under the old Act minors could seek the benefit of the section (VII W. R. 207 and I All. 207).

The same rule as is now laid down statutorily in section 7 was deducible from Mohammedan Law which required instant demand as a *sine qua non* for the exercise of the right, and accordingly, if a minor delayed in suing till he attained majority, there could be no immediate demand.—(N.W.P. S. D. A. 1865, p. 97).

12. Where there is a minor purchaser, a suit against him for pre-emption dates for the purposes of limitation from the date of institution and not from the date of appointment of guardian *ad litem* by the Court—(IV All. 37).

PART III.

APPENDICES.

I. A.)
I. B.) } —Notified agricultural tribes.

II.—Localities held to be or not to be Sub-
Divisions of Towns.

III. A.—Notified Towns.

III. B.—Places held to be towns and not notified.

IV.—Areas notified under Section 8 (2).

V.—Towns and Sub-Divisions where custom has
been found to exist.

VI.—Punjab Laws Act.

VII.—Act II of 1905.

VIII.—Regulation II of 1906.



APPENDIX I A.

AGRICULTURAL TRIBES.

Gazette Notification No. 63 of 18th April 1904.

In exercise of the powers conferred by section 4, Punjab Alienation Act,....., the Lieutenant-Governor of the Punjab, with the previous sanction of the Governor-General in Council, is pleased to determine for the purposes of the said Act:—

(1). In each district of the Punjab mentioned in column 1 of the Schedule annexed to the notification, all persons, either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district in column 2, shall be deemed to be an agricultural tribe within that district.

(2). All the agricultural tribes within any one district shall be deemed to be a group of agricultural tribes.

(NOTE.—Additions to the original list are noted in the schedule, with the number and date of the notification.)

SCHEDULE.

1	2	1	2
District.	Tribe.	District.	Tribe.
Amritsar ...	Arain. Awan (No. 93, dated 5th June 1907). Dogar. Gujar. Jat. Kamboh. Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Syad. Awan. Bhatti. Biloch. Ghakkar. Gujar. Janjua. Jat. Jodh. Jodhra. Kabut. Khattar. Koreshi.	Attock (Notification No. 36, dated 31st January 1906)— <i>concl'd.</i>	Mair and Manhas. Maliar. Moghal. Pathan. Rajput. Rati Sheikh } No 176, dated Sadiqi Sheikh } 17th July 1912. Syad.
Attock (Notification No. 36, dated 31st January 1906).		Delhi ...	Ahir. Arain. Biloch. Chauhan. Gora. Jat. Mali. Meo. Moghal. Pathan. Rajput. Reah. Ror. Saini. Syad. Taga.

1	2	1	2
District.	Tribe.	District.	Tribe.
Dera Ghazi Khan.	Arain. Biloch. Jat. Khetran. Koreshi. Machi. Mughal. Mujawar. Pathan. Rajput. Syad.	Gurdaspur— <i>concl'd.</i>	Dogar. Gujar. Jat. Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Saini. Syad.
	Arain. Bodla. Dogar. Gujar. Kamboh. Labana (No. 100, dated 30th March 1906). Mahtam. Musalman Jat. Other Jat. Pathan. Rajput. Saini. Syad (No. 168, dated 30th August 1909).		Ahir. Biloch. Gujar. Jat. Khanzada. Koreshi. Mali. Meo. Moghal. Pathan. Rajput. Syad. Taga (No. 76, dated 4th April 1910).
Ferozepore	Arain. Awan. Biloch. Bodla (No. 126, dated 9th September 1911). Dogar (No. 87, dated 25th May 1908). Ghakkar. Gujar. Jat. Kamboh. Kharrals (No. 126, dated 9th September 1911). Labana (No. 100, dated 30th March 1906). Mahtam (No. 126, dated 9th September 1911). Moghal. Pathan. Rajput. Syad.	Gurgaon ...	Ahir. Arain. Bishnoi. Dogar. Gujar. Jat. Mali. Moghal. Pathan. Rajput. Syad.
Gujranwala	Arain. Awan. Bahrupia (No. 12, dated 13th January 1913). Biloch. Gujar. Jat. Koreshi. Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Syad.	Hissar ...	Arain. Awan. Bhatti. Chhang. Dogar. Girath. Gujar. Jat. Kanet. Labana (No. 100, dated 30th March 1906). Mahton. Moghal. Pathan. Rajput. Saini. Arain (No. 91, dated 8th June 1908). Biloch. Jat. Kokarsa. Koreshi. Nekokarsa. Rajput. Syad.
	Arain. Awan. Bahrupia (No. 12, dated 13th January 1913). Biloch. Gujar. Jat. Koreshi. Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Syad.	Hoshiarpur	Turk (No. 194, dated 8th August 1906).
Gujrat ...	Arain. Awan. Bahrupia (No. 12, dated 13th January 1913). Biloch. Gujar. Jat. Koreshi. Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Syad.	Jhang ...	
Gurdaspur ...	Arain. Chhang (No. 163, dated 25th August 1909).		

1	2	1	2
District.	Tribe.	District.	Tribe.
Jhelum ...	Akra.	Karnal— <i>concl'd.</i>	Jat.
	Awan.		Kamboh.
	Bhatti.		Koreshi.
	Biloch.		Mali.
	Chauhan.		Meo.
	Chib.		Moghal.
	Ghakkar.		Pathan.
	Gujar.		Rajput.
	Jalap.		Ror.
	Janjua.		Saini (No. 127, dated 20th May 1909).
	Jat.		Syad.
	Jodh.		Taga.
	Kahut.		Usmani.
	Kasar.		Arain.
	Khandoya.		Awan.
	Khokkar.		Biloch (No. 135, dated 18th August 1908).
	Koreshi.		Bodla.
	Lilla.		Dogar (No. 85, dated 25th May 1908).
	Mair and Manhas.	Lahore ...	Jat.
	Maliar.		Kamboh.
	Moghal and Koh.		Kharral.
	Panwar.		Koreshi.
	Pathan.		Labana.
	Phaphra.		Mahtam.
	Rajput.		Moghal.
	Sail.		Pathan.
	Sohlan.		Rajput.
	Syad.		Syad.
	Arain.		Arain.
	Awan.		Awan.
	Dogar.		Dogar.
Jullundur ...	Gujar.		Gujar.
	Jat.	Ludhiana ...	Jat.
	Kamboh.		Kamboh.
	Koreshi (No. 195, dated 30th July 1912).		Labana (No. 100, dated 30th March 1906).
	Labana (No. 100, dated 30th March 1906).		Pathan.
	Mahton.		Rajput.
	Pathan.		Saini.
	Rajput.		Syad.
	Saini.		Arain.
	Syad.		Bhatti.
	Chhang (No. 300, dated 10th December 1912).		Biloch.
Kangra ...	Dagi.	Lyallpur (Notification No. 79, dated 12th April 1907).	Gujar.
	Gaddi.		Jat.
	Girath.		Kamboh.
	Gujar.		Khagga.
	Jat.		Kharral.
	Kanet.		Kokara.
	Koli.		Koreshi.
	Rajput.		Pathao.
	Rathi.		Rajput.
	Thakur.		Saini.
Karnal ...	Abbasi.	Mianwali ...	Syad.
	Ahir.		Abir.
	Arsari.		Arain.
	Arain.		Awan.
	Dogar.		Baghban.
	Gadidi.		Biloch.
	Gujar.		Gujar.

1	2	1	2
District.	Tribe.	District.	Tribe.
Mianwali— concl'd.	Jat. Kharral. Khokhar. Koreshi. Pathan. Rajput. Syad. Ahir. Arain. Awan. Biloch. Gujar. Jat. Kamboh. Kharral. Khokhar. Koreshi. Mahtam. Moghal. Od. Pathan. Rajput other than Bhatia. Syad. Arain. Bhatti. Biloch. Bodia (No 107, dated 6th July 1908). Jat. Kamboh. Khagga (No. 107, dated 6th July 1908). Kharral. Koreshi (No. 107, dated 6th July 1908). Mahtam. Pathan. Rajput. Syad. Arain (No. 187 A, dated 22nd November 1907). Biloch.	Rohtak ...	Ahir. Biloch. Gujar. Jat. Mali. Moghal. Pathan. Rajput. Ror. Syad. Ahir. Arain. Awan. Biloch. Gujar. Jat. Kamboh. Khokkar. Koreshi. Maliar. Moghal. Pathan. Rajput. Syad.
Mooltan ...		Shahpur ...	
Montgomery		Sialkot ...	Arain. Awan. Baghban. Dogar. Ghakkar. Gujar. Jat. Kamboh. Koreshi (No. 193, dated 8th August 1906). Labana (No. 100, dated 30th March 1906). Moghal. Pathan. Rajput. Saini. Syad.
Muzaffargarh	Jat. Koreshi. Pathan. Rajput. Syad. Awan. Biloch. Dania. Dhund. Ghakkar. Gujar. Jat. Jodhra. Kethwal. Khattar. Koreshi. Maliar. Moghal. Pathan. Rajput. Satti. Syad.	Umballa ...	Ahir. Arain. Biloch. Gora. Gujar. Jat. Kamboh. Zanet (No. 60, dated 22nd May 1908). Lobana (No. 100, dated 30th March 1906). Magb. Mali. Moghal. Pathan. Rajput. Ror. Saini. Syad. Taga.
Rawalpindi...			

APPENDIX I B.

AGRICULTURAL TRIBES.

In exercise of the powers conferred by section 4 of the Punjab Alienation of Land Act, 1900 (XIII of 1900), as amended by section 5 of Act I of 1907, the Lieutenant-Governor has been pleased to determine for the purposes of the said Act :—

- (1) that the following persons, holding land or residing in the districts named, shall be deemed to be members of an agricultural tribe;
- (2) that the said tribe shall not be included in any group of agricultural tribes in any of the districts mentioned.

By Notification No. 2666-S., dated 1st October 1909.

Gaur Brahmins in the Rohtak, Delhi, Karnal or Gurgaon Districts or Hissar, Hansi and Fatthabad Tahsils of Hissar District.

The term "Gaur Brahmins" shall not include "Bohra."

By Notification No. 175, dated 7th October 1910.

The Bhiwani Tahsil of Hissar was added to the above.

By Notification No. 103, dated 28th April 1910.

Kakazais in Jhelum District.

By Notification No. 252-S., dated 26th May 1910, as amended by No. 183, dated 30th November 1911.

Brahmans of Dara, Hamirpur, Palampur, Kangra and Nurpur Tahsils of Kangra District.

The term "Brahmans" in this notification shall not include Bujru, Acharaj, Bhat, Saniasi, Gujrati, or Bhojki Brahmans.

By Notification No. 128, dated 26th September 1911.

Mazhbi Sikhs in Gurgaon District.

By Notification No. 129, dated 26th September 1911.

Mazher Sikhs in Lyallpur District.

By Notification No. 284, dated 15th November 1912.

Tarnaich Brahmans in Pathankot Tahsil, Gurdaspur District.

By Notification No. 285, dated 15th November 1912.

Basotra Brahmans in Shakargarh Tahsil Gurdaspur District.

By Notification No. 286, dated 16th November 1912.

Dat Brahmans in Gurdaspur District or Raya Tahsil, Sialkot District.

APPENDIX II.

LOCALITIES HELD TO BE OR NOT TO BE SUB-DIVISIONS
OF A TOWN.

Town.	Held to be	Ruling.	Not to be	Ruling.
AMRITSAR ...	Katra Kanak Mandi. Katra Parja ... Lohi Mandi ... Guruka Basar... Katra Harsa Singh. Katra Ahluwalian Katra Talab Tunda. Katra Moti Ram Katra Nihal Singh. Katra Karm Singh. Katra Misr Beli Ram. Kila Bhangian Katra Kanhayar Katra Ramgharian. Katra Amar Singh.	P. R. 46 of 1882. P. R. 154 of 1882. C. A. 175 of 1888. C. A. 19 of 1894. P. R. 58 of 1900. C. A. 1271 of 1900. and P. R. 21 of 1907. C. A. 339 of 1904 (Divl. Court). P. R. 99 of 1906. P. R. 113 of 1906. P. R. 140 of 1906. P. R. 6 of 1907. P. R. 13 of 1907. C. A. 39 of 1905. P. R. 47 of 1907. P. R. 54 of 1907. P. R. 9 of 1909.	Gali Parja in Katra Parja. Katra Patrangan, part of Kila Bhangian.	P. R. 154 of 1882. P. R. 13 of 1907.
BATALA ...	Moh. Jhalkian... Moh. Imli ... Moh. Sheikhan	P. R. 133 of 1888. P. R. 199 of 1889. P. R. 199 of 1889.		
BHAWANI ...	Moh. Bhag Dhagan. Thulla Narsan. The town is divided into two <i>pannas</i> .	P. R. 16 of 1902. P. R. 71 of 1902. P. R. 16 of 1902.		
BHERA ...	...	...	Moh. Purian ...	P. R. 42 of 1891.
DELHI ...	Pabari Dhiraj... Moh. Gali Kasim Jan. Haveli Khan Dauran Khan.	P. R. 68 of 1879. P. R. 108 of 1895. P. R. 147 of 1908.	Kucha Pati Ram Moh. Dassan, part of Billamaran. Kucha Aql Khan	P. R. 35 of 1908. P. R. 116 of 1908. P. R. 120 of 1906.

(NOTE.—In P. R. 64 of 1887, Plowden, J. wrote: "It is not denied that Delhi is divided into sub-divisions. I express no opinion as to whether a *mohalla* is a sub-division of the city of Delhi."

In P. R. 120 of 1906 it was held—

We are not prepared to lay down there are no sub-divisions in Delhi for the purpose of the Act.

In P. R. 116 of 1908 it was held—

We are not prepared to say whether there are or are not sub-divisions in Delhi.

The point is of little importance except as regards the suburbs outside the walls, as the custom has been found to prevail everywhere within the walls).

Town.	Held to be	Ruling.	Not to be	Ruling.
FEROZEPORE ...	Moh. Kassaban Moh. Kharadian and Moh. Jauri- wala referred to as such. City is divided into such. Moh. Kassaban which includes Kuccha Nihal Singh.	P. R. 44 of 1903. 62 of 1912.	Ludhiana Bazar ...	C. A. 3 of 1899,
GUJRAT ...	Khoja Moh.	P. R. 13 of 1900.		
HAFIZABAD ...	Kabir Darwaza, Abadi Jadid of M. Garhi Awan.	17 P.W.R. of 1907. P. R. 84 of 1910.		
HANSI ...	Ghosi Moh. ...	P. R. 70 of 1899.		
JAGADHRI ...	Moh. Haripur ... Nimwala Bazar	39 P. W. R. of 1907.	Moh. Barwala ...	P. R. 67 of 1907.
JAGRAON ...	Moh Bhogi ...	P. R. 100 of 1892.		
JULLUNDUR ...	Moh. Muftian ... Moh. Kajuran- wala. Moh. Khadian ... Moh. Haripur ... Nimwala Bazar Moh. Karor Khan Moh. Shaikhan. Moh. Tayyab ... Moh. Kanun- goyan. Moh. Mimarar or Pansarian. Moh. Marathan.	P. R. 33 of 1885. P. R. 7 of 1907. 39 P. W. R. of 1907. C.A. 264 of 1908. P. R. 71 of 1905. P. R. 78 of 1911. P. W. R. 139 of 1911.	Moh. Kikar Bazar Katra Jua Khana	P. R. 100 of 1892. P. R. 70 of 1909.
KAITHAL ...				
KHEMKAERN ...	Kot Nau ... Kot Vichla ... Kot Kohna ...	P. R. 32 of 1909.		
LAHORE ...	Moh. Mohliyan Kucha Satthan Guzar Talwara Guzar Rarra ... Moh. Kazi Sadur- ud-din Sutar M a n d i Bazar. Moh. Wachhowah Goal Mandi, Kila Gujar Singh. Moh. Kabuli Mal There are sub- divisions in Lahore, the city cannot be treat- ed as a whole. Bazar Gumti ...	P. R. 189 of 1882. P. R. 6 of 1905. P. R. 72 of 1886. P. R. 22 of 1911. P. R. 48 of 1888. P. R. 8 of 1893. P. R. 86 of 1901. P. R. 17 of 1895. P. R. 16 of 1907. P. R. 90 of 1907. P. R. 138 of 1907. P. R. 138 of 1907. P. R. 91 of 1911.	Sua Bazar, Bazar Chauhata. Mufti Bakar, Guzar Rarra. Rang Mahal, Kucha Chabuk Sawaran Pari Mahal ... Guzar Mubarak Khan. Kucha Gulzari Shah Kucha Billa Kabu- tran.	C. A. 1569 of 1879. P. R. 83 of 1901. P. R. 86 of 1901. P. R. 2 of 1903. P. R. 6 of 1905. P. R. 16 of 1907. P. R. 138 of 1907.

Town.	Held to be	Ruling.	Not to be	Ruling.
LUDHIANA ...	Moh. Awan or Bhabrian.	} P. R. 38 of 1906.		
MOZANG ...	Moh. Bandian... Kot Abdulla Shah being one of 4 sub-divisions			
MULTAN ...	Moh. Khudayar Khanwala.	P. R. 83 of 1888.	Moh. Gidarpur ...	P. R. 57 of 1906.
	Moh. Marochian	P. R. 165 of 1888.		
	Moh. Sultanjanj	P. R. 170 of 1889.		
	Moh. Bhabrian-wala	P. R. 23 of 1890.		
	Tarf Ravi ...	C. A. 496 of 1903		
	Bairun Pak Darwaza.	P. R. 42 of 1906.		
NUR MAHAL ...	...	...	No sub-divisions ...	P. R. 42 of 1905.
NIKODAR ...	Moh. Bhabran...	P. R. 109 of 1900.		
	Bhabra Ghaus and Kalian.	P. R. 59 of 1911.		
PESHAWAR ...	Karimpura & 4 others,	P. R. 29 of 1888.	Moh. Bakshi Ram Sahai.	P. R. 29 of 1888.
	Sarasia ...	} P. R. 42 of 1903.		
	Jahangirpura ...			
	Andar Shahr ...			
	Karimpura ...			
RAWALPINDI ...	Ganja ...			
	Moh. Parachian or Matta or Waris Khan.	P. R. 26 of 1907.		
REWARI ...	Moh. Kaithwara	C. A. 2790 of 1886		
		C. A. 654 of 1888.		
	Moh. Said Sarai	} P. R. 17 of 1896.		
	Moh. Raoli Hat			
	Moh. Bagh Shitab Rai.			
ROHTAK ...	Moh. Campbell	P. R. 55 of 1880.		
SADHAURA ...	Moh. Pirzadagan	P. R. 107 of 1900.		
SIALKOTE ...	Moh. Pathana n	P. R. 37 of 1888.	Bazar Khatikan	C. A. 635 of 1886.
	Moh. Wadharian	P. R. 122 of 1907.		
SONEPAT ...	Moh. Mashd ...	} C. A. 1165 of 1905		
	Moh. Kote ...			
WAZIRABAD ...	Moh. Lakhian ...	P. R. 105 of 1887.		

APPENDIX III A.

NOTIFIED TOWNS.

PUNJAB GOVERNMENT GAZETTE.

GENERAL.

The 10th November 1908.

No. 677.—*Notification.*—In exercise of the powers conferred by section 3, clause (3) (a), of the Punjab Pre-emption Act, 1905, the Lieutenant-Governor is pleased to declare the following places to be towns within the meaning of that section :—

Hissar District ...	<ul style="list-style-type: none"> (1) Bhiwani. (2) Hansi. (3) Hissar. (4) Fatahabad. (5) Sirsa. (6) Tohana. 	Jullundur District ...	<ul style="list-style-type: none"> (1) Jullundur City. (2) Jullundur Cantonments. (3) Kartarpur. (4) Alawalpur. (5) Naskodar. (6) Phillour. (7) Nurmahal. (8) Nawashahr. (9) Rahon. (10) Banga.
Rohtak District ...	<ul style="list-style-type: none"> (1) Rohtak. (2) Beri. (3) Kalanaur. (4) Gohana. (5) Bahadurgarh. (6) Kharkhauda. (7) Jhajjar. (8) Mahm. 	Delhi District ...	<ul style="list-style-type: none"> (1) Delhi City and Cantonments. (2) Sonapat. (3) Ballabgarh. (4) Faridabad. (5) Najafgarh. (6) Mahrauli.
Gurgaon District ...	<ul style="list-style-type: none"> (1) Farrukhnagar. (2) Sohna. (3) Rewari. (4) Palwal. (5) Hodal. (6) Firozpur. (7) Hattin. (8) Hidayatpur Chhaoni 	Karnal District ...	<ul style="list-style-type: none"> (1) Karnal. (2) Panipat. (3) Kaithal. (4) Pandri. (5) Thanesar. (6) Ladwa. (7) Shahabad.
Kangra District ...	<ul style="list-style-type: none"> (1) Dharmsala. (2) Kangra. (3) Nurpur. 	Ambala District ...	<ul style="list-style-type: none"> (1) Ambala City. (2) Ambala Cantonment. (3) Jagadhri. (4) Buriya. (5) Sadhaura. (6) Rupar. (7) Kasauli. (8) Kalka.
Hoshiarpur District ...	<ul style="list-style-type: none"> (1) Hoshiarpur. (2) Garhdiwala. (3) Hariana. (4) Mukerian. (5) Miani. (6) Tanda Urmar, Cancelled, 1910. (7) Dasuya Kaithan. (8) Garhshankar. (9) Una. (10) Anandpur. (11) Khaupur. 	Simla District ...	<ul style="list-style-type: none"> (1) Simla. (2) Kasumpti. (3) Jatogh. (4) Dagsbai. (5) Subathu. (6) Solon.

(NOTE.—Notwithstanding the cancellation Urmar was treated as a town in P. R. 29 of 1912.)

Sialkot District ...	(1) Sialkot City and Cantonments.	Gurdaspur District - concluded.	(6) Batala.
	(2) Pasrur.		(7) Dera Nanak.
	(3) Kila Sobha Singh.		(8) Srigovindpur.
	(4) Narowal.		(9) Pathankot.
	(5) Daska.		(10) Sujjanpur.
	(6) Jamke.		
	(7) Zafarwal.		(1) Gujrat.
	(8) Chawinda.	Gujrat District ...	(2) Jalalpur.
	(9) Kalaswala.		(3) Dinga.
	(10) Sambrial.		(4) Kunjah.
			(5) Kadirabad.
	(1) Gujranwala.		(1) Shahpur.
Gujranwala District	(2) Eminabad.	Shahpur District ...	(2) Miani.
	(3) Kila Didar Singh.		(3) Bhera.
	(4) Wazirabad.		(4) Sahiwal.
	(5) Ramnagar.		(5) Khushab.
	(6) Akalgarh.		
	(7) Hafizabad.		(1) Jhelum City and Cantonments.
	(8) Khangah Dogran.	Jhelum District ...	(2) Chakwal.
			(3) Pind Dadan Khan.
			(4) Bahaun.
	(1) Ludhiana.		
Ludhiana District...	(2) Jagraon.		(1) Rawalpindi City and Cantonments.
	(3) Khanna.		(2) Murree.
	(4) Machhiwara.	Rawalpindi District	(3) Gujar Khan.
	(5) Raekot.		
	(1) Mudki.		(1) Pindigheb.
	(2) Makhu.		(2) Attock.
	(3) Moga.	Attock District ...	(3) Hazro.
	(4) Zira.		(4) Campbellpur.
Ferozepore District	(5) Dharmkot.		
	(6) Muktsar.		(1) Isa Khel.
	(7) Fazilka.		(2) Kalabagh.
	(8) Ferozepore City (within octroi limits).		(3) Bhakkar.
	(9) Ferozepore Cantonments.	Mianwali District...	(4) Leiah.
			(5) Karor.
			(6) Mianwali.
	(1) Montgomery.		
Montgomery District.	(2) Kamalia.		(1) Jhang.
	(3) Pakpattan.		(2) Maghiana.
	(4) Dipalpur.		(3) Chiniot.
		Jhang District ...	(4) Kot Isa Shah.
	(1) Lahore.		(5) Lalian.
	(2) Lahore Cantonments		(6) Shorkot.
Lahore District ...	(3) Kasur.		(7) Ahmadpur.
	(4) Khem Karn.		
	(5) Patti.		(1) Multan.
	(6) Chunian.		(2) Shujabad.
	(7) Sharakpur.		(3) Jalalpur.
		Multan District ...	(4) Kahrur.
	(1) Amritsar City and Cantonments.		(5) Duniapur.
	(2) Jandiala.		(6) Talamba.
	(3) Majitha.		
	(4) Vairawal.		(1) Muzaffargarh.
Amritsar District ..	(5) Tarn Taran.		(2) Khangarh.
	(6) Atari.		(3) Alipur.
	(7) Jalalabad.		(4) Khairpur.
	(8) Raja Sansi.	Muzaffargarh District.	(5) Shahr Sultan.
	(9) Nowshera Pannu.		(6) Sitapur.
	(10) Fatahabad.		(7) Jatoi.
	(11) Ramdas.		(8) Kot Adu.
			(9) Rangpur.
	(1) Gurdaspur.		
	(2) Dalhousie.	Dera Ghazi Khan District.	(1) Dera Ghazi Khan.
Gurdaspur District	(3) Bakloh.		(2) Jampur.
	(4) Dinanagar.		(3) Dajal.
	(5) Kalanaur.		(4) Rajanpur.
			(5) Mithankot.

APPENDIX III B.

Places not notified as towns dealt with as towns by the Court.

Saidpur, Jhelum, P. W. R. 2 of 1911.

Urmar, Hoshiarpur, P. R. 29 of 1912.

APPENDIX IV.

AREAS NOTIFIED

UNDER SEC. 7 (2), ACT II OF 1905,

8 (2), ACT I OF 1913

1. *Notification No. 260, dated 10th March 1906.*—In Mauza Atari in the Sialkot City (Sialkot District) in khasras Nos. 439, 440, 441, 442 and 450, land known as Sardar Jagjot Singh's and situated between the Railway Station and the City of Sialkot.

2. *Notification No. 678, dated 10th November 1908.*—The areas of the following markets (*mandis*):—

Mogha Market (Ferozepore District).
 Giddar Baha Market (Ferozepore District).
 Abobar Market (Ferozepore District).
 Guru Harsahai Market (Ferozepore District).
 Pattoki Market (Lahore District).
 Kaithal Market (Rohtak District).
 Rohtak Market (Rohtak District).
 Tohana Market (Hissar District).
 Dabwali Market (Hissar District).
 Budhlada Market (Hissar District).

3. *Notification No. 705, dated 17th November 1908.*—The lands shown in the schedules annexed, situated in Mianapura, Mahal Kakkar, Mahal Atari, District Sialkot (for boundaries and khasras, *vide* the Notification).

4. *Notification No. 598, dated 23rd August 1909.*—The areas acquired under the following notifications:—

NOTIFICATION.	Area.	Purpose.
	Acres.	
(1) No. 40 G.S., dated 31st May 1904 ...	227	Jhang Market.
(2) No. 41 G.S., dated 31st May 1904 ...	84	} Shah Jiwana Market.
No. 797 G., dated 28th February 1905.	85 37	
(3) No. 173, dated 14th February 1906 ...	206·21	Chuharkhana Market Town.
(4) No. 1229 G.S., dated 13th September 1904	30	} Campbellpore Civil Bazar.
No. 1356 G.S., dated 22nd September 1904	15·02	

5. *Notification No. 771, dated 6th December 1910—*

- (a) Any local area to which the Government Tenants Act, 1893, has been made applicable.
- (b) Any area on the Sidbnai and Sohag Para Canals which was originally granted by Government under a lease containing a stipulation that a right of pre-emption in such area shall not be acquired or acquirable.

APPENDIX V.

TOWNS AND QUARTERS WHERE CUSTOM EXISTS OR DOES NOT EXIST.

Town.	Quarter.	Exists.	Quarter	Does not exist.
I.— <i>Re</i> ALL PROPERTY.				
AMRITSAR ...	Moh. Parja ...	P. R. 154 of 1882	Guru Bazaar ...	C. A. 682 of 1894.
AMBALA ...	Whole City ...	P. R. 111 of 1906. C. A. 931 of 1895.		
BATALA ...	...	...	Bazar Tahsilwala	P. R. 87 of 1890.
CHINIOT ...	Whole City ...	P. R. 68 of 1890		
DELHI ...	Whole City ...	P. R. 64 of 1887		
	Naya Bazar ...	P. R. 64 of 1887		
	Teliwara and			
	Pabaridhiraj...	P. R. 103 of 1889		
	Whole City ...	P. R. 81 of 1906		
		P. R. 122 of 1906		
		P. R. 116 of 1908		
	Moh. Dassan ...	C. A. 474 of 1905		
	Chandni Chauk	P. R. 81 of 1906		
	Egerton Road	P. R. 122 of 1906		
	Billamara and			
	Moh. Dassan ...	P. R. 116 of 1908		
	Moh. Khan Duran			
	Khan ...	P. R. 147 of 1908		
DERA ISMAIL ...	...	...	Moh. Kazianwala	P. R. 69 of 1901.
HANSI ...	...	...	Ghosi Moh. ...	P. R. 70 of 1899.
HAFIZABAD ...	...	...	Abadi Jadid Garhi	
			Awan ...	P. R. 84 of 1910.
JALRAON ...	...	...	Moh. Bhogi ...	P. R. 100 of 1892.
KATSARGANJ.				
(FAZILKA TAH.)	...	...	...	C. A. 570 of 1904.
KUNJAH (DIST.				
GUJRAT) ...	...	P. R. 96 of 1910		
LAHORE ...	Sua Bazar ...	C. A. 1569 of 1879		
	Sathan Kucha	P. R. 72 of 1836	Moh. Mohliyan ...	P. R. 6 of 1905.
PESHAWAR ...	Generally ...	P. R. 153 of 1884		
	Moh. Dhilan ...	P. R. 10 of 1886		
	Moh. Karimpura	P. R. 29 of 1888		
MULTAN ...	Tarf Ravi ...	P. R. 42 of 1906		
	Whole City ...	P. R. 57 of 1906		
	Bairun Pak Dar-			
	waza ...	P. R. 57 of 1906		
SHAHPUER ...	...	...	Moh. Parachian ...	C. A. 1822 of 1904.
SONEPAT ...	...	...	Not general ...	C. A. 1165 of 1905.
			Moh. Mashad ...	C. A. 1165 of 1905.
URMAR (HOSHI-				
ARPUR) ...	...	...	...	P. R. 28 of 1912.

(NOTE.—Though gazetted originally as a town this notification *re* Urmar was cancelled in 1910).

Town.	Quarter.	Exists.	Quarter.	Does not exist.
	II.— <i>Re Houses.</i>			
AMBITAR ...	Katra Nihal Singh Katra Dula ... Kila Bhangian ... Katra Motiram Katra Karm Singh Katra Misr Beli Ram ... Katra Ahluwalia Katra Kanhayar	C. R. 1708 of 1897 C. A. 948 of 1901 C. A. 39 of 1905 P. R. 99 of 1906 P. R. 140 of 1906 P. R. 6 of 1907 P. R. 21 of 1907 P. R. 47 of 1907	Katra Amar Singh	P. R. 9 of 1909.
BAGHBANPURA ...	...	...	...	P. R. 99 of 1900.
BATALA ...	Whole City ... Moh. Imli ...	P. R. 17 of 1889 P. R. 199 of 1889		
BHAWANI ...	Thulla Solhan, Panna Lohar... Thulla Bansi ...	C. A. 573 of 1901 P. R. 117 of 1890 C. A. 630 of 1904	Thulla Narsan, Pan- na Jaunpal ... Moh. Bhag Daggan, Th. Asian Jaunpal	C. A. 237 of 1900, P. R. 71 of 1902. P. R. 16 of 1902.
BHERA ...	...	P. R. 42 of 1891		
DELHI ...	Pahari Dhiraj ... Moh. Kasim Jan Gali Sandagaran Whole City ... Moh. Maliwara Chandni Chauk Kucha Aql Khan Egerton Road ... Kucha Patiram... Billamara ... Moh. Khan Duran Khan ...	P. R. 68 of 1879 C. A. 498 of 1905 P. R. 108 of 1895 P. R. 36 of 1897 P. R. 17 of 1903 P. R. 43 of 1903 P. R. 67 of 1906 P. R. 120 of 1906 P. R. 122 of 1906 C. A. 969 of 1903 P. R. 88 of 1905 P. R. 120 of 1906 P. R. 122 of 1906 P. R. 35 of 1908 P. R. 32 of 1899 P. R. 147 of 1908		
DASUHA ...	...	P. R. 61 of 1912		
DINGA (GUJRAT) ...	...	C. A. 19 of 1880 P. R. 19 of 1909		
FEROZEPUR ...	Moh. Kassaban and in many, if not most, sub- divisions. Kucha Nihal Singh, part of Moh. Kassaban	P. R. 44 of 1903 P. R. 62 of 1812		
GOHANA (ROH- TAK) ...	...	P. R. 82 of 1889		
GUJRAT ...	...	P. R. 113 of 1881...	On relationship ...	P. R. 88 of 1880,
	Khoja Mohalla...	P. R. 13 of 1890 ...	Kabir Darwaza Moh.	11 P.W.R. 1907.
GURDASPUR ...	...	P. R. 97 of 1880 P. R. 108 of 1886		
JAGADHRI ...	Moh. Barwala... Moh. Haripur	P. R. 67 of 1907 39 P.W.R. of 1907		

Towd.	Quarter.	Exists.	Quarter.	Does not exist.
JALAPUR (GUJ- RANWALA) ...	...	P. R. 56 of 1885		
JULLUNDUR ...	Whole City ...	P. R. 12 of 1883 .. C. A. 472 of 1904 P. R. 70 of 1909	Moh. Karor Khan...	C. A. 284 of 1908.
	Moh. Muftian ...	P. R. 33 of 1885 P. R. 53 of 1888		
	Moh. Kajuranwala	P. R. 7 of 1907		
KAITHAL ...	General & Moh. Tayyab ...	P. R. 71 of 1905 ...	Moh. Marathan ...	P. W. R. 139 of 1911.
	Moh. Mimiran or Pansarian ...	P. R. 78 of 1911 P. R. 32 of 1909		
KHEM KARN ...	Kot Nau ...	P. R. 102 of 1881		
LAHORE ...	...	P. R. 189 of 1882	K. Rang Mahal ..	P. R. 86 of 1901.
	Moh. Mohliyan	P. R. 45 of 1888	(Part of Kucha Kakkazian Moh. Kazi Sadr-ud-din, Guzar Rarra.)	
	Gujar Talwara	P. R. 91 of 1892	Moh. Kakkazian (proximity),	P. R. 68 of 1906.
	General ...	P. R. 8 of 1893	Guzar Rarra (by reason of tahzami- ni).	P. R. 8 of 1893.
	Guzar Rarra ...	P. R. 17 of 1895	Goal Mandi of K. Gujjar Singh.	P. R. 90 of 1907.
	Sutar Mandi ...	P. R. 16 of 1907	Moh. Acharjan, Part of Gumti Bazar.	P. R. 91 of 1911.
	K. Gulzari Shah, Moh. Wachho- wali).			
	Moh. Jalotian ...	P. R. 112 of 1907		
	K. Bila Kabutar- baz (Moh. Ka- buli Mal).	P. R. 138 of 1907		
	Moh. Sathan ...	P. R. 22 of 1911		
LUDHIANA ...	General in City. Moh. Awan,	P. R. 192 of 1888 P. R. 38 of 1906		
	Moh. Bandian and General			
MOZANG ...	Kot Abdulla Shah	P. R. 52 of 1903		
MUKERIAN ...	...	...		P. R. 70 of 1902.
MULTAN ...	General in City	C. A. 585 of 1877 P. R. 170 of 1889 C. A. 496 of 1903 P. R. 57 of 1906 P. R. 83 of 1888	Moh. Sultanganj (outside City).	P. R. 170 of 1889.
	Moh. Khudayar Khanwala.			
	Moh. Marochian	P. R. 165 of 1888		
	Tarf Ravi ...	C. A. 496 of 1903 P. R. 42 of 1906 P. R. 57 of 1906		
	Bairun Pak Dar- waza.			
NIKODAR ...	...	...	Moh. Bhabran (by reason of proximi- ty).	P. R. 109 of 1900.
			Baba Malak ...	59 of 1911.
NUR MAHAL ...	...	P. R. 36 of 1899 P. R. 42 of 1905 P. R. 24 of 1887		
PANIPAT ...	...	P. R. 70 of 1890 F.R.		
RAWALPINDI ...	...	P. R. 26 of 1907		
REWARI ...	Moh. Parachian Moh. Raoli Hat	P. R. 17 of 1896	Moh. Kaithwara .. Generally ... Moh. Bagh Shitabrai Moh. Said Sarai ...	C. A. 654 of 1888. C. A. 2790 of 1888. P. R. 17 of 1896. P. R. 17 of 1896.
SADHAURA ...	Moh. Pirzadagan	P. R. 107 of 1800		P. R. 69 of 1884.
SAMRIAL (SIAL- KOTE)	...	...	...

Town.	Quarter.	Exists.	Quarter.	Does not exist.
SIALKOT ...	Moh. Wadharian and General.	P. R. 122 of 1907		
WAZIRABAD ...	Moh. Pathanan	P. R. 37 of 1888		
	All 4 Hers of town	C. A. 695 of 1895		
	Moh. Beparian Generally and in Moh. Lakhian ...	C. A. 707 of 1904 P. R. 105 of 1887		
	III.—Re SHOPS.			
AMBALA ...	(Block of shops)	...		P. R. 111 of 1906.
AMRITSAR ...	Katra Bangian...	P. R. 48 of 1882 ...	Katra Bangian ...	P. R. 13 of 1907.
	Papar Mandi ...	C. A. 1516 of 1888	Katra Kanak Mandi	P. R. 46 of 1832.
	Bazar Papron ...	P. R. 113 of 1906	Katra Lohi Mandi	C. A. 175 of 1883.
	K. Nihal Singh	...	Katra Ahluwalia ..	C. A. 1271 of 1900.
			Katra Harsa Singh	P. R. 58 of 1900
			Katra Talab Tunda	C. A. 339 of 1904.
			Darshani Darwaza	P. R. 19 of 1905.
			Katra Patrangian	P. R. 13 of 1907.
			Katra Ramgbarian	P. R. 54 of 1907. P. R. 68 of 1907.
BANGA ...	(Dist. Jullundur)	P. R. 71 of 1912	...	
BATALA ...	Suburbs ...	...		P. R. 70 of 1898.
CHINIOT ...	...	P. R. 32 of 1899		P. R. 68 of 1890.
DELHI ...	Billamarian ...	P. R. 88 of 1905 ...		
	Chandni Chowk	P. R. 81 of 1906	Moti Bazar ...	P. W. R. p. 46 of 1906.
	General in City	P. R. 81 of 1906		
DEFA ISMAIL ...	...	...	Chota Bazar ...	C. A. 685 of 1898.
FEROZPORE ...	...	...	Ludhiana Bazar ...	C. A. 3 of 1899.
HISSAR ...	...	R. 90 of 1901...	Moh. Sanao ...	P. R. 90 of 1901.
LAHORE ...	Guzar Talwara	R. 48 of 1888...	Sutar Mandi ...	P. R. 17 of 1895.
			Bazar Chaubata,	P. R. 83 of 1901.
			Mufti Bakar,	
MULTAN ...	Taraf Ravi ...	P. R. 42 of 1906		
NUR MAHAL ...	...	...		P. R. 89 of 1895.
PESHAWAR ...	Andar Shahr Bazar.	P. R. 42 of 1903		
ROHTAK ...	...	...	Campbell Mohalla	P. R. 55 of 1880.
	IV.—Fe PLOT OF AGRICULTURAL LAND.			
AMRITSAR ...	Civil Station ...	...		P. R. 27 of 1907.
DELHI ...	...	...	Jahanuma ...	P. R. 21 of 1900.
LUDHIANA ...	...	...	Mehal Baghar ...	P. R. 74 of 1897.
UNA ...	...	...		P. R. 51 of 1907.
	V.—Re TAWELAS.			
DELHI ...	Moh. Gali Kasim Jan.	P. R. 108 of 1895		

Town.	Quarter.	Exists.	Quarter.	Does not exist.
	VI.— <i>Re</i> WARE- HOUSES.			
AMRITSAR ...	Katra Nihal Singh.	P. R. 113 of 1906		
	VII.— <i>Re</i> BUILD- ING SITES.			
BATALA ...	...		Suburbs ...	P. R. 70 of 1898.
DELHI ...	...		Jahannuma ...	P. R. 103 of 1889.
LAHORE ...	...		Moh, Kila Gujar Shah.	P. R. 90 of 1907.
PANIPAT ...	...	P. R. 145 of 1906.		
	VIII.— <i>Re</i> LARGE BLOCKS OF THE NATURE OF KATRAS.			
LAHORE ...	...	...	Pari Mahal ...	P. R. 2 of 1903.

APPENDIX VI.

PUNJAB LAWS ACT.

9. The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire in the cases hereinafter specified immoveable property in preference to all other persons. It arises in respect of sales (whether under a decree or otherwise) of immoveable property and of foreclosures of rights to redeem such property.

10. Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the Settlement record or not, be presumed —

- (a) to exist in all village communities, however constituted, and,
- (b) to extend to the village site, to the houses built upon it, to all lands and shares of land within the village boundary, and to all transferable rights of occupancy affecting such lands.

11. The right of pre-emption shall not be presumed to exist in any town or city, or any sub-division thereof, but may be shown to exist therein, and to be exercisable therein by such persons and under such circumstances as the local custom prescribes.

12. If the property to be sold or the right to redeem which is to be foreclosed is situate within, or is a share of a village the right to buy or redeem such property belongs, in the absence of a custom, to the contrary,—

- (a) first, in the case of joint undivided immoveable property, to the co-sharers ;
- (b) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor ;
- (c) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the land-owners of the *patti* or other sub-division of the village in which the property is situate, jointly ;
- (d) fourthly, if the land-owners of the *patti* or other sub-division make no joint claim to exercise such right, to such landholders severally ;

- (e) fifthly, to any land-holders of the village ;
- (f) sixthly, to the tenants (if any) with rights of occupancy in the property ;
- (g) seventhly, to the tenants (if any) with rights of occupancy in the village ;

Provided that when the property is land, to the trees standing on which the Government is entitled, such right belongs to the Lieutenant-Governor of the Punjab in preference to all other persons.

Where two or more persons are equally entitled to such right, the vendor or mortgagor may determine which of them shall exercise the same.

Nothing in the former part of this section shall be deemed to affect the Punjab Tenancy Act, 1887, Section 53, but, if a landlord refuse or neglect to exercise the right conferred on him by that section, such right belongs, first, to the tenants (if any) with rights of occupancy in the property concerned, and, secondly, to the tenants (if any) with right of occupancy in the village in which such property is situate.

13. When any person proposes to sell any property, or to foreclose the right to redeem any property, in respect of which any person has a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell such property, or of the amount due in respect of the mortgage, as the case may be.

Such notice shall be given through any Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the *chaupal* or other public place of the village, town or city in which the property is situate.

14. Any person having a right of pre-emption in respect to any property proposed to be sold shall lose such right unless within three months from the date of giving such notice he pays or tenders to the person so proposing to sell the price aforesaid or the fair market-value of the property, or deposits the same in the Court from which the notice is issued. When any money is so deposited, the Court shall give notice of such deposit to the vendor or mortgagor, as the case may be.

15. When the right of pre-emption arises in respect of the foreclosure of the right to redeem any property, any person entitled to such right may at any time within three months after the giving of the notice

required by section 13, pay or tender to the mortgagee or his successor in title the amount specified in such notice, or the amount really due on the footing of the mortgage, and shall thereupon acquire a right to purchase the property.

On the completion of the purchase the person exercising the right of pre-emption shall be bound to pay to the mortgagee or his successor in title the amount specified in such notice, together with interest on the principal sum secured by the mortgage, at the rate specified by the instrument of mortgage, for any time which has elapsed since the date of the notice, and any additional costs which may have been properly incurred by the mortgagee or his successor in title.

16. Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds, namely :—

- (a) that no due notice was given as required by section 13;
- (b) that tender was made under section 14 or section 15 and refused;
- (c) in the case of sale, that the price stated in the notice was not fixed in good faith;
- (d) in the case of a foreclosure, that the amount claimed by the mortgagee was not really due on the footing of the mortgage or was not claimed in good faith, or that it exceeds the fair market-value of the property mortgaged.

If, in the case of a sale, the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market-value of the property sold.

If, in the case of a foreclosure, the Court finds that the amount claimed by the mortgagee was not really due on the footing of the mortgage, or that it was not claimed in good faith or that it exceeds the fair market-value of the property mortgaged, the amount to be paid to the mortgagee shall not exceed what the Court finds to be such market-value.

16a. When any suit is instituted under section 16, the Court may in its discretion require the plaintiff to pay into Court the price or market-value of the property, or, in the case of a right to redeem property, the amount really due on the footing of the mortgage, and, if such requisition is not complied with in such time as the Court directs, may reject the plaint.

19. In case of sale by joint owners, no person who has been a party can withdraw his own share and claim a right of pre-emption as to the rest.

20. In villages in which the chakdari tenure prevails, the co-sharers in a well have a right of pre-emption as to shares in such well in preference to a general proprietor in any such village having no share in the well, merely receiving a *haq zamindari* from the *chakdars*.

APPENDIX VII.

THE PUNJAB PRE-EMPTION ACT OF 1905 WHERE DIFFERING FROM ACT OF 1913.

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be called the Punjab Pre-emption Act, 1905.

(2) *As section 1 (2), Act of 1913.*

2. (1) The enactments specified in the Schedule hereto annexed are repealed to the extent mentioned in the third column thereof.

(2) *As section 2 (2), Act of 1913.*

(3) Notwithstanding any thing to the contrary in section 4 of the Punjab General Clauses Act, 1898, this Act shall apply to every claim to the right of pre-emption, whether that right has accrued before or after its commencement, save and except any such right in respect of which payment, tender or deposit has been made or a suit has been brought under any of the provisions hereby repealed.

3. In this Act, unless a different intention appears from the subject or context,—

(1) ‘agricultural land’ shall mean ‘land’ as defined in the Punjab Alienation of Land Act, 1900, and includes any right of occupancy acquired or existing under the Punjab Tenancy Act, 1887, or under any earlier law ;

(2) ‘village immoveable property’ shall mean immoveable property within the limits of village sites, other than agricultural land ;

(3) *As section 3 (3) in Act of 1913.*

(4) ‘member of an agricultural tribe’ shall have the meaning assigned to it by the Punjab Alienation of Land Act, 1900 ;

(5) ‘sale’ shall not include sales in execution of a decree or order of a Civil, Criminal or Revenue Court or of a Revenue Officer ;

(6) *As section 3 (6) in Act of 1913.*

4. *As section 4, Act of 1913.*
5. *As section 6, Act of 1913.*
6. *As section 7, Act of 1913, except first phrase.*
7. (1) *As section 8 (1), Act of 1913.*

(2) No right of pre-emption shall exist in any other local area which the Local Government may by notification specify.

8. *As section 9, Act of 1913, up to 1894.*
9. *As section 10, Act of 1913.*
10. *As section 11, Act of 1913.*

CHAPTER III.

PERSONS IN WHOM THE RIGHT OF PRE-EMPTION VESTS.

11. No person other than a member of an agricultural tribe shall have a right of pre-emption in respect of agricultural land :

Provided that if the vendor is not a member of an agricultural tribe the right of pre-emption may be exercised also by a member of the same tribe as the vendor who is recorded as the owner or as the occupancy tenant of agricultural land in the estate in which the property is situate and has been so recorded for twenty years previous to the date of the sale either in his own name or in that of any agnate who has previously held his agricultural land.

12. Subject to the provisions of section 11, the right of pre-emption in respect of agricultural land and village immoveable property shall vest—

- (a) in the case of the sale of such land or property by a sole owner or occupancy tenant, or, when such land or property is held jointly, by the co-sharers,

in the persons who but for such sale would be entitled to inherit the property in the event of his or their decease, in order of succession ;

- (b) in the case of a sale of a share of such land or property held jointly—

first, in the lineal descendants of the vendor in the male line in order of succession ;

secondly, in the co-sharers, if any, who are agnates, in order of succession ;

thirdly, in the persons described in sub-clause (a) of this sub-section and not hereinbefore provided for ;

fourthly, in the co-sharers, (i) jointly, (ii) severally ;

(c) *As section 15 (c), Act of 1913, with the addition of words (i) jointly, (ii) severally, in secondly, thirdly and fourthly.*

Explanation 1.—In the case of a sale of a right of occupancy, clauses (a), (b) and (c) of this sub-section, with the exception of sub-clause fourthly of clause (c), shall be applicable.

Explanation 2.—In the case of sale by a female of property to which she has succeeded through her husband, son, brother or father, the word ‘agnates’ in this section shall mean the agnates of the person through whom she has so succeeded.

13. (1) The right of pre-emption in respect of urban immovable property shall vest—

first, in the co-sharers in such property (if any), (i) jointly, (ii) severally ;

secondly, if such property consists of the site of a building or other structure, in the owner of such building or structure ;

thirdly, if such property consists of a floor of a building, then to the person or persons to whom the adjoining floor or floors belong ;

fourthly, in such person as has a common staircase with the vendor ;

fifthly, in such person as has a common entrance from the street with the vendor ;

sixthly, in a neighbour whose property is servient, the property alienated being dominant, and *vice versa* ;

seventhly, in a person whose immoveable property is adjacent to such property.

(2) No right of pre-emption shall exist in respect of the sale of, or the foreclosure of a right to redeem—

(a) a shop, *serai* or *katra*, or

(b) a *dharmshala*, mosque or other similar building.

14. *As section 17, Act of 1913, to end of clause (d), except vice "land or property" read "property," and vice "estate or recognized sub-division thereof" read "patti or estate"*

(e) in any other case, by such among them as the vendor may determine.

15. *As section 18, Act of 1913.*

CHAPTER IV.

PROCEDURE.

16. *As section 19, Act of 1913.*

17. *As section 20, Act of 1913.*

18. *As section 21, Act of 1913.*

19. (1) In every suit for pre-emption the Court shall at, or at any time before, the settlement of issues require the plaintiff, within such time as the Court may fix,—

(a) to deposit in Court such sum as does not, in the opinion of the Court, exceed one-fifth of the probable value of the property, or

(b) to give security to the satisfaction of the Court for the payment, if required, of a sum not exceeding such probable value.

(2) Every sum deposited or secured under sub-section (1) shall be available for the discharge of costs.

(3) If the plaintiff fails within the time fixed by the Court to make the deposit or furnish the security mentioned in sub-section (1), his plaint shall be rejected.

(4) *As section 22 (5), Act of 1913.*

20. In every suit for pre-emption in respect of the sale of agricultural land the Court shall of its own motion inquire into and decide the following issues whether the facts involved therein be admitted or not—

(a) whether the sale in respect of which pre-emption is claimed is or is not in contravention of the Punjab Alienation of Land Act, 1900 ;

- (b) whether the plaintiff is or is not a member of an agricultural tribe; and if he is not a member of an agricultural tribe, whether he has or has not a right to claim pre-emption under the proviso to section 11 of this Act; and
- (c) whether, if he is a member of an agricultural tribe, the sale to him would or would not have effect as a permanent alienation under section 3 (2) of the Punjab Alienation of Land Act, 1900, without the sanction of the Deputy Commissioner.

21. (1) In the case of a sale of agricultural land, if the Court finds that the sale in respect of which pre-emption is claimed is in contravention of the Punjab Alienation of Land Act, 1900, or that the plaintiff is not a member of an agricultural tribe and is not entitled to claim pre-emption under the proviso to section 11 of this Act, the suit shall be dismissed.

(2) If, in any such case, the Court finds that, although the plaintiff is a member of an agricultural tribe, the sale would not have effect as a permanent alienation under section 3 (2) of the Punjab Alienation of Land Act, 1900, without the sanction of the Deputy Commissioner, the Court shall, subject to the provisions of section 26, proceed with the suit.

22. *As section 25, Act of 1913, except vice "fixed in good faith or paid" read "paid or fixed in good faith."*

23. (1) If, in the case of a foreclosure, the parties are not agreed as to the amount at which the pre-emptor shall exercise his right of pre-emption, the Court shall determine whether the amount claimed by the mortgagee is really due on the footing of the mortgage or whether it is claimed in good faith or whether it exceeds the market-value of the property, and if it finds that the amount is not so due or that it is not so claimed or that it exceeds such market-value, it shall fix as the price for the purposes of the suit the market-value of the property.

(2) If the Court finds that the amount is really due on the footing of the mortgage or that it is claimed in good faith or that it does not exceed the market-value of the property, it shall fix such amount as the price for the purposes of the suit.

24. *As section 27, Act of 1913, only vice "land or property" read "property."*

25. *As section 28, Act of 1913,*

26. (1) In cases referred to in section 21 (2) the decree, in addition to the particulars stated in section 214 of the Code of Civil Procedure, shall declare that the decree-holder shall not obtain possession until he has received the sanction of the Deputy Commissioner under section 3 (2) of the Punjab Alienation of Land Act, 1900.

(2) In every such case the price, if deposited in Court by the pre-emptor, shall remain in the custody of the Court until the Deputy Commissioner has decided whether he will grant or withhold his sanction, and shall thereafter be paid to the person entitled to receive the same.

27. *As section 29, Act of 1913, except exclude "or if no appeal lies to the Divisional Court."*

CHAPTER V.

OF LIMITATION.

28. Any person who has, at the commencement of this Act, a right to sue for pre-emption which is not provided for under Article 10 of the Second Schedule of the Indian Limitation Act, 1877, and is not barred under Article 120 of the said Schedule, may exercise such right at any time within one year from the date of such commencement.

29. *As section 30, Act of 1913.*

SCHEDULE,

[See section 2 (1).]

ENACTMENTS REPEALED.

Acts of the Governor-General in Council.

No. and year.	Short title.	Extent of repeal.
IV of 1872	Punjab Laws Act, 1872	Sections 9—20, both inclusive.
XII of 1878	Punjab Laws (Amendment) Act, 1878 ...	Section 2.
XVII of 1887	Punjab Land Revenue Act, 1887	Sections 79 (2) and 87.
VII of 1895	Punjab Laws Act Amendment Act, 1895 ...	Section 3.
XII of 1891	Amending Act, 1891	Section 2 (2) and the Second Schedule in so far as they relate to section 12 of the Punjab Laws Act, 1872, as amended by section 2 of Act XII of 1878.
I of 1903	The Repealing and Amending Act, 1903 ...	Section 3 and the Second Schedule in so far as they relate to Act XII of 1878.

APPENDIX VIII.

REGULATION No. 11 of 1906.

Regulation to make better provision for the Law relating to pre-emption in the North-West Frontier Province.

Whereas it is expedient to make better provision for the law relating to pre-emption in the territories for the time being administered by the Chief Commissioner of the North-West Frontier Province; it is hereby enacted as follows:—

1. This Regulation may be called the North-West Frontier Province Pre-emption Regulation, 1906.

2. The Punjab Pre-emption Act, 1905 (hereinafter referred to as "the said Act"), shall be in force in the territories for the time being administered by the Chief Commissioner of the North-West Frontier Province: Provided that—

- (a) the portions of the said Act specified in the first column of the Schedule shall, in their application to the said territories, be construed subject to the alterations indicated in the second column of the said Schedule;
- (b) section 20, clauses (a) and (c), section 21, clauses (a) and (c), and sections 26 and 27 of the said Act as hereby altered shall not apply to the districts of Peshawar and Kohat;
- (c) all references in the said Act to the Local Government shall be construed as referring to the Chief Commissioner of the North-West Frontier Province; and
- (d) all references in the said Act to the Punjab Alienation of Land Act, 1900, shall be construed as referring to the Act as modified in its application to the North-West Frontier Province by Regulation I of 1904:

Provided also that, for the purpose of facilitating the application of the said Act, a Court may, subject to the other provisions of this Regulation, construe it with such further alteration not affecting the substance as may be necessary or proper to adapt it to the matter before the Court.

3. Sub-section (2) of section 79 and section 87 of the Punjab Land Revenue Act, 1887, and sections 34 to 41 of the North-West Frontier Province Law and Justice Regulation, 1901, shall be repealed.

THE SCHEDULE.

[Section 2, provisos (a) and (b)].

Alterations in portions of the Punjab Pre-emption Act, 1905, as applied to the North-West Frontier Province.

Sections of Act.	Alterations.
Section I (2)	<i>Substitute</i> " (2) It extends to the territories for the time being administered by the Chief Commissioner of the North-West Frontier Province."
Section 2 (I) & Schedule	<i>Omit.</i>
Section 3 (I)	<i>Substitute</i> for the words "or under any earlier law" the words and figures "or the Hazara Tenancy Regulation, 1887, or the Agror Valley Regulation, 1891, or under any other law or Regulation."
Section 12 (a)	<i>Insert</i> after the word "entitled" the words "by right of blood relationship."
Section 12 (c), <i>secondly</i>	<i>Substitute</i> for the word " <i>patti</i> " or other sub-division" the words "kundi, tal, or other principal sub-division."
Section 14 (c)	<i>Substitute</i> for the word " <i>patti</i> ," in both places where it occurs, the words "kundi, tal."
Section 16, ...	<i>Substitute</i> for the word "chaupal" the word "hujra"
Section 19 (I) (a)	<i>Substitute</i> " (a) to deposit in Court such sum as does not, in the opinion of the Court, exceed the probable value of the property or in the case of a right to redeem property the amount really due on the footing of the mortgage, or."
Section 21 ...	<i>Omit</i> in sub-section (1) the figure "(1)" and <i>insert</i> between the word "finds" and the word "that" the letter "(a)"; and between the word "or" and the word "that" the letter "(b)", and <i>substitute</i> in sub-section (2) for the figure "(2)" the letter "(c)."

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